93-1076

NO. _____

Supreme Court, U.S.
FILED
DEC 29 1993
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANKLIN M. WRIGHT, Administrator Of The Estate Of CHRISTINE WRIGHT, Deceased,

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., DAVID A. DAVIS, M.D., DAVID GREENE, M.D. and CHRISTOPHER WALLS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia Decision

Arthur C. Nilsen
Counsel For Petitioner
Jonap & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033
(404) 320 - 6000

80 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution of the State of Georgia of 1983 is unconstitutional as it sets out in the Preamble, to perpetuate the principles of free government and to promote the interests and happiness of the citizens of the State of Georgia without mention of its being subsidiary to the Constitution of the United States and specifically to the Fourteenth Amendment thereof, and further lacking in any statements as to the powers of the state being set out and given thereto by the Constitution of the United States.

2. Does the actions and enforcement of the Constitution of the State of Georgia of 1983, by the Court of Appeals of the State of Georgia, and the refusal to

accept certiorari by the Supreme Court of Georgia, and thus upholding the decision of the Court of Appeals of the State of Georgia in the instant case involving the diversity of citizens, ie. the Petitioner a resident of Michigan, and in view of the Preamble to the Constitution of the State of Georgia of 1983, then show greater flagrant emphasis by said court to the reading of Article 1, S 1, P 1, of the Constitution of the State of Georgia of 1983, as to protection to persons and property of Georgia being the paramount duty of the government of Georgia, to which the court is sworn, thus depriving the Petitioner the right of the equal protection of the Fourteenth Amendment of the Constitution of the United States?

3. Whether the Georgia Court of Appeals in upholding the Trial Court's decision

and the subsequent denial of certiorari by the Georgia Supreme Court exceeded their discretion as to the requirements and permissive discretion of the Official Code of Georgia Annotated Section: 9-11-38, depriving the Petitioner of the protection of the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States as to: due process, the right to a trial by jury, and equal protection as to diversity of citizenship, where the record reflected that the Petitioner was a resident of the State of Michigan, and the Respondents/Defendants at trial were residents of the State of Georgia.

4. Whether the Official Code of Georgia Annotated Section: 9-11-9.1 creates a defense in bar which is arbitrary and capricious, violating both substantive

and due process of law, thus being unconstituional, violating the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Whether the Official Code of Georgia Annotated Section: 9-11-9.1 creates a special class which is overly broad and which discriminates and as such is arbitrary and capricious as to its construction and subsequent application, thus being unconstitutional, violating the equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

6. Whether the Official Code of Georgia Annotated Section: 9-11-9.1 by taking away professional medical malpractice claimants' property right to a remedy through the courts from the special class - medical professionals, who are the

proximate cause of the injury or negligent act, are not the claimants specifically deprived of substantive due process as in fact guaranteed by the Constitution of the United States?

LIST OF ALL PARTIES

Petitioner:

Franklin M. Wright, Administrator Of The Estate of Christine Wright, Deceased

Represented By:

Arthur C. Nilsen
Jonap & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033

Respondents:

Crawford Long Hospital of Emory University

Represented By:

Sidney F. Wheeler, Esq.
J.M. Hudgins, IV, P.C.
Long, Weinberg, Ansley & Wheeler
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

John D. Schellack, M.D.

Represented By:

John A. Guilleland, Esq.
Kimberly Loque Woodland, Esq.
Love and Willingham
Suite 5050
One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309

Christopher Dooley, M.D.

Represented By:

Sidney F. Wheeler, Esq.
J.M. Hudgins, IV, P.C.
Long, Weinberg, Ansley, & Wheeler
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

M. Edwyn Harrison, M.D.

Represented By:

John A. Gilleland, Esq.
Kimberly Loque Woodland, Esq.
Love and Willingham
Suite 5050
One Atlantic Center
1201 W. Peachtree street
Atlanta, Georgia 30309

William A. Davis, M.D.

Represented By;

Hunter S. Allen, Jr., Esq.
Bradley C. Reeves, Esq.
Allen & Peters
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309

David Greene, M.D.

Represented By:

Hunter S. Allen, Jr., Esq.
Bradley C. Reeves, Esq.
Allen & Peters
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309

Christopher Walls, M.D.

Represented By:

Sidney F. Wheeler, Esq.
J.M. Hudgins, IV, P.C.
Long, Weinberg, Ansley, & Wheeler
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

As 28 U.S.C. s 2403(b) may be applicable:

The State of Georgia

Represented By:

Michael J. Bowers
Attorney General
- State of Georgia
132 State Judicial Building
42 Capital Square, S.W.
Atlanta, Georgia 30334

TABLE OF CONTENTS

PAGE

I. Questions Presented for Review (i)

II. List of All Parties (vi)

III. Official Report of Case (xi)

IV. Table of Authorities (xii)

V. Statement of Jurisdiction 1

VI. Statement of the Case 3

VII. Argument for Allowance of Writ. 24

VIII. Conclusion 28

X. Appendix A1

- Judgement of Trial Court date 9/13/91.....A1
- Supreme Court of Georgia decision dated 2/12/92.....B1
- Court of Appeals decision dated 9/8/92.....C1
- Supreme Court of Georgia decision dated 9/8/93.....D1
- Supreme Court of Georgia decision dated 10/01/93.....E1
- Text of Authorities Cited.....F1

OFFICIAL REPORT OF CASE

Superior Court of Fulton County, State of Georgia, Civil Action File No. D-90848, Christine Wright vs. Crawford Long Hospital of Emory University, John K. Schellack, M.D., Christopher Dooley, M.D., M. Edwyn Harrision, III, M.D., William A. Davis, M.D., David Greene, M.D., and Christopher Walls, M.D..

The Supreme Court of the State of Georgia, Case No. S92A0520, Christine Wright v. Crawford Long Hospital of Emory University Et Al.....Appendix Page B1

The Court of Appeals of the State of Georgia, Case No.: A92A0964, 205 Ga.App. 653, 423 S.E.2d 12.....Appendix Page C1

The Supreme Court of the State of Georgia, Case No.: S93C0114, Christine Wright v. Crawford Long Hospital of Emory University Et Al.....Appendix Page D1

The Supreme Court of the State of Georgia, Case No.: S93C0114, christine Wright v. Crawford Long Hospital of Emory University Et.Al.....Appendix Page E1

TABLE OF AUTHORITIES

Amendment 5 to the Constitution of the United States.....Appendix Page F1

Amendment 7 to the Constitution of the United States.....Appendix Page F1

Amendment 14, Section 1, to the Constitution of the United States
Appendix Page F2

The Preamble to the Constitution of the State of Georgia of 1983.Appendix Page F3

Article 1, S 1, P 1 of the Constitution of the State of Georgia of 1983
Appendix Page F3

Article 1, S 1, P 2 of the Constitution of the State of Georgia of 1983
Appendix Page F3

Article 1, S 1, P 11 (a) of the Constitution of the State of Georgia 1983
Appendix Page F4

Official Code of Georgia Annotated, Section 9-2-61.....Appendix Page F4

Official Code of Georgia Annotated, Section 9-11-9.1.....Appendix Page F5

Official Code of Georgia Annotated, Section 9-11-15.....Appendix Page F8

Official Code of Georgia Annotated, Section 9-11-38.....Appendix Page F12

The pertinent text of the above listed constitutional provisions, statutes and regulations involved in this case, are set out verbatim in the appendix.

TABLE OF AUTHORITIES - continued

Case Page

Binford v. Reid, 83 Ga. App. 280, 63 SE2d 345 (1951).....17

Brake v. Mintz, 193 Ga. App. 622, 666 (1989).....20

Cheeley v. Henderson, 261 Ga. 498 (3), 405 SE2d 865 (3) (1991).....14

Colonial Pipeline v. Brown, 258 Ga. 115, 365 SE2d 827 (1988).....23

Denton v. Conway Express, Inc. No. S90A1101 March 15, (1991), 402 SE2d 269 (1991).....23,27

Glaser v. Meck, 258 Ga. 468, 369 SE2d 912 (1988).....13

In Re Parrott, 194 Ga. App. 856, 392 SE2d 480 (1990).....11,15,17

Mayor of Savannah v. State ex rel Greed, 4 Ga. 26 (1948).....8

TABLE OF AUTHORITIES - continued

Case Page

Mead Corp. v. Collins, 258 Ga. 239, 367 SE2d 790 (1988).....8

Patterson v. Douglas Women's Center, P.C., 258 Ga. 803, 374 SE2d 737 (1989).....13

Pyler v. Doe, 457 US 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).....21

Alternative Principle and Economic Due Process 80 Harv. L. Rev. 1463 (1967).....20

Georgia Laws, Section 3, pp. 887, 889-890.....13

STATEMENT OF JURISDICTION

The jurisdiction of this Court, comes forward from the final decision of the State of Georgia's court of last resort, the State of Georgia Supreme Court, which, on reconsideration, on October 1st, 1993, denied the Petitioner's Motion For Reconsideration and thereafter informed the Court of Appeals of the State of Georgia, which then transmitted to the trial court the Court of Appeals' remittitur.

Further, wherein said court of last resort, the Supreme Court, of the State of Georgia, by its actions has decided an important question of federal law which has not been decided by this Court, and may in fact conflict with applicable decisions of this Court, as to the

constitutionality of its state constitution and a state statute is in conflict with the Constitution of the United States and/or application, interpretation, and/or implementation of its state constitution and or statute, contrary to established federal law, and the Constitution of the United States, and wherein the further conflicts as to construction and/or application, interpretation, and/or implementation of a state statute, thus jurisdictional ground for this Honorable Court is established.

STATEMENT OF THE CASE

This petition for Writ of Certiorari arises out of the performance of an act or acts of medical malpractice committed upon the Petitioner, on or about July 3rd, 1989, by the Respondents.

The Petitioner filed her Professional Malpractice Complaint on June 27th, 1991, in the Superior Court of Fulton County of the State of Georgia, in accordance with the appropriate State of Georgia Statutes, and more specifically the Official Code of Georgia Annotated Section: 9-11-9.1, to the best of her knowledge and understanding thereof. In accordance with O.C.G.A. 9-11-9.1, the Petitioner submitted with her complaint, the sworn affidavit albeit the deposition of her personal medical doctor, Dr.

Pamela Benitez of the State of Michigan, the state of residence of the Petitioner at the time. The complaint was filed within 10 days of the statute of limitations running. Via the U.S. Mails, on June 28th, 1991 the Petitioner filed an amendment to her complaint, alleging that in accordance with O.C.G.A. 9-11-9.1(b) that her complaint had been filed within 10 days of the statute of limitations running and that she was unable to supply an affidavit of a medical doctor as to the allegations of her complaint, and was in accordance with the statute, invoking the 45 day period within which to file the additional medical doctor's affidavit. The court received and filed the amendment, July 1st, 1991, still prior to the actual date of the statute of limitations running. Respondents were served with the Summons,

Complaint and subsequent amendment and answered in due course. On August 7th, 1991, within the allowed 45 day extension period, the Petitioner filed her second amendment to her complaint, stating that in accordance with O.C.G.A. 9-11-15 and O.C.G.A. 9-11-9.1, amended her complaint, by adding thereto, the sworn affidavit of Jose L. Evangelista, M.D.. Dr. Evangelista was a medical doctor, licensed by the State of Georgia, who had reviewed the available medical records of the Petitioner. Dr. Evangelista, did not have an opportunity to review the admission x-rays of the Petitioner, to the Respondent Hospital, due to its failure to make same available.

Respondent Schellack, was served with Summons and Complaint on July 1st, 1991. He filed his answer on August 2nd,

1991, and had the Petitioner served with his Motion to Dismiss for failure to comply fully with O.C.G.A. 9-11-9.1, on August 5th, 1991.

On August 2nd, 1991, Attorney J.M. Hudgens IV, P.C., representing three of the Respondents, issued a letter to the Petitioner's attorney, threatening an action for abusive litigation against the Petitioner and her attorney. The basis for his threat was the enclosure of the missing Respondent Hospital's admission x-ray which clearly showed the existence of the fifty centimeter catheter lead wire inside of the Petitioner's body. This was further noteworthy in that it was an actual admission to one of the counts of the initial complaint, that the Respondents had knowledge of the wire within the Petitioner's body and failed

to warn and failed to remove the wire, thus discharging the Petitioner with the fifty centimeter catheter lead still in her body but, without her knowledge of same.

Having filed her appropriate amendment consisting of the sworn affidavit of Dr. Evangelista, within the allowable 45 day period from the original date of her filing her professional medical malpractice complaint and in accordance with the provisions of O.C.G.A. 9-11-9.1, the Petitioner filed her response to the Respondent's motion to dismiss, on September 2nd, 1991, stating same.

On September 11th, 1991, the Petitioner filed a supplemental response to the Respondent's motion to dismiss. In her supplemental response, she alleged

that O.C.G.A. 9-11-9.1 was unconstitutional. Her allegations were initially based on the Constitution of the State of Georgia, Art. III, Sec. V. Par. III, which states: "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof." Mayor of Savannah v. State ex rel Greed, 4 Ga. 26 (1948), The purpose of this constitutional provision is to protect against surprise legislation. Mead Corp. v. Collins, 258 Ga. 239, 367 SE2d 790 (1988). O.C.G.A. 9-11-9.1 totally fails in this regard. The Petitioner further alleged that the statute did not warn of the dire substantive consequences which would result from the failure to follow administrative requirements exactly. The Petitioner further stated that: "the

language of the statute is so vague that persons of ordinary intelligence are forced to guess at its meaning. Such guesswork is at that persons' peril. Any defects in the affidavit are not amendable and, thus, the effects of the statute become capricious and arbitrary. A plaintiff who guesses wrong would be irrevocably out of court. Certainly this violates all notions of fair play and substantial justice."

On September 13th, 1991, the Trial Court issued an Order, stating that: "upon full consideration of the record, Defendants' Motion to Dismiss is hereby GRANTED." The Court further stated in its last paragraph: "We therefore GRANT the Defendant's Motion for Summary Judgment and DISMISS the Plaintiff's Complaint for failure to comply with

O.C.G.A. 9-11-9.1.

On October 2nd, 1991, the Petitioner filed her Notice of Appeal with the Trial Court to the Supreme Court of Georgia rather that the Court of Appeals, due to jurisdiction over the case being that of the Supreme Court pursuant to the Constitution of the State of Georgia, as to the constitutional questions raised as to O.C.G.A. 9-11-9.1 and the implementation of same by the Trial Court.

On February 12th, 1992, the Supreme Court of Georgia transferred the case to the Court of Appeals, stating that they did not have jurisdiction.

On February 21st, 1992 the Petitioner filed her motion for reconsideration with the Supreme Court of

Georgia. She also filed her enumerations of error with the Court of Appeals of the State of Georgia.

On approximately March 1st, 1992, the Petitioner filed her brief with the Court of Appeals.

On March 12th, 1992, the Supreme Court denied the Petitioner's motion for reconsideration.

On September 8th, 1992, the Court of Appeals found that the trial court properly granted the Respondents' motion to dismiss. They further took the position that the trial court did not rule on the Petitioner's contentions that O.C.G.A. 9-11-9.1 was unconstitutional thus claiming nothing for appellate review based on In Re Parrott, 194 Ga. App. 856, 392 SE2d 480 (1990).

The Court of Appeals found that the deposition of Dr. Benitez did not set forth specifically at least one negligent act or omission claimed, in accordance with their view of O.C.G.A. 9-11-9.1. They thus stated that the complaint originally filed was subject to be dismissed for noncompliance with O.C.G.A. 9-11-9.1.

The Court of Appeals found that paragraph (b) of O.C.G.A. 9-11-9.1 did not apply because the Petitioner did not allege the inability to submit the affidavit of Dr. Evangelista, with the originally filed complaint. The Court of Appeals did not address the uniqueness of the filing of the complaint within 10 days of the statute of limitations running, as specifically set out in the statute.

The Court of Appeals failed to permit any amendments to the complaint, although it is clearly the law to freely permit amendments to be filed in the State of Georgia, under O.C.G.A. 9-11-15. While the amendment itself may denoted the inability to file an affidavit of an expert, it was done so under O.C.G.A. 9-11-15 as an action of notice pleading of the additional sworn affidavit, adding as a 24th paragraph to the complaint and not to strike the submission of the expert affidavit submitted albeit a sworn deposition. The additional affidavit filed on August 7th, 1991 was done so under O.C.G.A. 9-11-15. Glaser v. Meck, 258 Ga. 468, 369 SE2d 912 (1988), and Patterson v. Douglas Women's Center, P.C., 258 Ga. 803, 374 SE2d 737 (1989). The Court of Appeals based their opinion on a case cited by the court of a

decision of the Supreme Court of Georgia, which was decided the same day as the Petitioner filed her original complaint within the 10 days prior to the statute of limitations running. Cheeley v. Henderson, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991). The Court of Appeals by holding to this position, permitted the application by the Trial Court to become in fact an adjudication not on the merits but, rather on the procedural hurdles. The ruling falls contrary to the title or the body of section 3, Georgia Laws 1987, pp. 887, 889-890, for there is no direction that a failure to comply with O.C.G.A. 9-11-9.1 sould result in an adjudication on the merits.

On September 24th, 1992, the Petitioner filed her motion for reconsideration with the Court of

Appeals. She stated that, the Cheeley case had been misconstrued as to the critical 10 day period. It was pointed out that the Court of Appeals was onerous on her to evaluate her expert affidavit albeit deposition, dismiss and re-file the case all within the 10 day period. As to the failure of the Court of Appeals to evaluate the constitutional question, the Petitioner addressed the mere case law position of In re Parrott, 194 Ga. App. 856 392 SE2d 480 (1990) which was a Criminal matter which was not on point for the record which the Trial Court had before it at the time it issued its Order. In fact, said case is easily distinguishable as follows: The case cited was a criminal matter as to the attempt of an incarcerated individual to change his name and the potential for confusion upon the general public. In

that case, the Appellant had not raised a constitutional issue at the trial level. In the instant case, the Petitioner raised the various constitutional questions, in her supplemental answer to the Respondents motion to dismiss. The Supplemental answer was filed with the Trial Court on September 11th, 1991, the Trial Court Granted the motion to dismiss, September 13th, 1991.

It was re-stated that the Trial Court had stated that it had ruled on the entire record of the court and based its entire order granting a motion to dismiss on the statute and its construction, thus implicitedly ruling on the constitutionality of the statute, whose question as to constitutionality had been raised by the Petitioner.

It is also noted that the Appellate

Court of In re Parrott, stated that the case turned on caselaw, Binford v. Reid, 83 Ga. App. 280, 63 SE2d 345 (1951), wherein the action of a Superior Court to grant or refuse a proper application to change the name of a person was based solely on sound legal discretion. The constitutionality of the statute had not been raised, and the Trial Court had not cited the statute as its reason for disallowing the name change but, rather the discretion of the court.

It was further noted that the court's use of the terminology of granting a summary judgment for the Respondents, the court had in fact ignored the res ipsa loquitur position as to the existence of a genuine issue of a material fact which needed to go to the trier of fact, the jury, to determine as

to the negligent act or omission taking place, violating the Petitioner's protection of the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States.

On October 1st, 1992, the Court of Appeals denied the Petioner's motion for reconsideration.

On October 6th, 1992, the Petitioner filed her notice of intent to apply for certiorari to the Supreme Court of Georgia.

On October 20th, 1992, the Petitioner filed her petition for certiorari to the Supreme Court of Georgia. She restated her position as to the constitutionality of the O.C.G.A. 9-11-9.1. She further asked the court to review the unique period of time as set

out by the legislature as to public policy for the period 10 days prior to the running of the statute of limitations. The March 13th, 1989 General Assembly Bill 329 adding paragraphs (e) and (f) are further distinguished by the opening statement of (e), "Except as allowed under subsection (b) of this Code Section..." (emphasis supplied) Paragraph (e) immediately negates itself wherein paragraph (b) is applicable and specifically the ten day period. The purpose of notice pleading and this statute is to make the parties aware of the negligence and omission involved. The apparent legislative purpose was administrative frugality, avoiding costly time and effort of the courts, to be expended by litigants in a professional malpractice action. The presentation of a prima facie case by

affidavit has been set solely as an administrative technique to have the parties ready on both sides from commencement of the action. In Brake v. Mintz, 193 Ga. App. 622, 666 (1989), the Court of Appeals dealt with the considerable uncertainty about when a Defendant should file an answer or even whether an answer is necessary until the Plaintiff supplements her pleading with the requisite expert's affidavit. To constur a further inability to amend a complaint or correct an incomplete or defective affidavit requirement, is a deprivation of due process. assuming arguendo the legislative ends are legitimate, it has to be shown that the very ends sought are not achieveable through less drastic methods. Struve, Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

The State and Defenders of such a statute must prove that there does in fact exist a compelling state interest to restrict claimants' fundamental rights. Pyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

On September 8th, 1993, the Supreme Court of Georgia denied the Petitioner's petition for certiorari.

On September 17th, 1993, the certificate of counsel as to authenticity of the petition for certiorari based on the belief that the statute, the decision and actions of the courts overlooked the appropriate state and federal constitutional provisions and/or erroneously construed or misapplied them to the instant case. In addition, on the 17th of September, the Petitioner filed her motion for reconsideration with the

Supreme Court of the State of Georgia. In her motion, she stated that the actions of the courts to either erroneously construe or misapply O.C.G.A. 9-11-9.1 deals with the question of whether the Constitution of the State of Georgia of 1983 is unconstitutional as it sets out in the Preamble, to perpetuate the principles of free government and to promote the interests and happiness of the citizens of the State of Georgia without mention of its being subsidiary to the Constitution of the United States and specifically the Fourteenth Amendment thereof, and further lacking in any statements as to the powers of the state being set out and given by the Constitution of the United States.

The Petitioner further stated the issue of diversity as to the parties and

the actions of the courts to deprive her of the right of equal protection of the Constitution of the United States. It was noted that the Supreme Court of Georgia in Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991) 402 SE2d 269 (1991), citing Colonial Pipeline v. Brown, 258 Ga. 115, 365 SE2d 827 (1988), stated that: "Georgia citizens have greater rights and even more benefits than the Federal Constitution."

The Petitioner addressed the courts having abridged her right to a trial by jury, the trier of fact in her case.

The constitutionality of O.C.G.A. 9-11-9.1 was raised as to its legislative intent and the overbreadth of the statute. Further the issue as to administrative purpose of the statute which in fact was a defense in bar

without remedy, such over breadth and creation of a special class stealing the property rights of the Petitioner and thwarting her equal protection and right to due process under the Constitution of the United States. The Petitioner attempted to have the Supreme Court deal with the issue of whether there was in fact, a compelling rationale for the violation of fundamental rights.

On October 1st, 1993, the Supreme Court of the State of Georgia, denied the Petitioner's motion for reconsideration.

ARGUMENT FOR ALLOWANCE OF WRIT

This is a case involving the diversity of citizenship of the parties. While this case originated in a state court, the rights of all citizens of the United States are guaranteed by the

United States Constitution yet those of the Petitioner were abridged.

The Petitioner's right to a trial by jury, was arbitrarily torn from her by the trial judge, contrary to constitutional and statutory mandates.

The judicial review of the trial court's actions was tainted by the reading of the Constitution of the State of Georgia 1983, giving greater weight to the citizens of the state over those citizens of other states, coupled with the judicial record of and statements therein by the court of last resort for the State of Georgia, the Georgia Supreme Court, thus depriving the Petitioner of her United States Constitutional rights as a citizen, to equal protection, due process of law and protection of her property rights, sought to be addressed

by the court action as a plaintiff against the Respondents for a professional medical malpractice action committed against the Petitioner, endangering her life and future patients should this matter not be brought forward and addressed by the courts, in which the Petitioner was injured and lost personal property.

The uniqueness of this case, the geographics of the Petitioner's state of residence, Michigan, her personal doctor being of Michigan and the Petitioner's inability to prejudge within 10 days and the conservative approach to amend he complaint to add an aditional affidavit, has cost her to lose her right to trial. By her actions, she complied with the intent of the legislation and legislature.

O.C.G.A. 9-11-9.1 has created a

special class of medical professional individuals who have ability thru administrative hoops, to create a bar of court, violate the substantive rights of the Petitioner and similar situated individuals as guaranteed by the Constitution of the United States.

The State of Georgia, court of last resort has stated, "that the Georgia Constitution offers Georgia citizens greater rights and even more benefits than the Federal Constitution." Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991) 402 S.E.2d 269 (1991). The actions of the Georgia Supreme Court, in its ruling on this case shows it to be once again following the authority and/or its own interpretation of its state constitution versus the dictates of the United States Constitution as to state

rights and the rights of all citizens of the United States, and thus establishing lesser rights for noncitizens of the State of Georgia in its court. The Georgia Constitution wanes in its power and authority to the Fourteenth Amendment to the United States Constitution and as such this case is ripe for judicial review by this Honorable Court to the questions of conflict of authority and subsequent decisions.

CONCLUSION

For the reasons stated, the writ should be granted and the judgement of the Court of Appeals of the State of Georgia should be reversed and the case remanded to the trial court for a jury trial.

The Petitioner, Franklin M. Wright, as Administrator of the Estate of

Christine Wright, who past away September, 1992, respectfully prays that this Honorable Court Grant his petition for certiorari.

Date this 27th day of December, 1993.

Respectfully submitted,

Jonap & Associates, P.C.

Arthur C. Nilsen
Counsel for Petitioner
Franklin M. Wright,
Administrator of the Estate
of Christine Wright, Deceased

APPENDIX

Judgment of Trial Dated 9/13/91

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

CHRISTINE WRIGHT Plaintiff, v. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREEN, M.D., and CHRISTOPHER WALLS, M.D., Defendants.	)	Civil Action File No. # 134012

ORDER

Upon full consideration of the record, Defendant's Motion to Dismiss is hereby **GRANTED**.

Plaintiff filed this medical malpractice action against Crawford Long

Hospital as well as six doctors alleging that the Defendants failed to remove an introducer wire used during the insertion of a central line catheter in Plaintiff's body on July 4th, 1989. The Plaintiff filed with her Complaint a deposition of Pamela Benitez, M.D., however, the Complaint did not include the expert affidavit required by O.C.G.A. 9-11-9.1(a). Neither did the Plaintiff's complaint allege that due to time constraints an expert affidavit could not be prepared and that Plaintiff would need the extra 45 days permitted by O.C.G.A. 9-11-9.1(b).

On July 1, 1991, in an attempt to comply with the O.C.G.A. 9-11-9.1 requirement, the Plaintiff filed an amended Complaint stating that due to time constraints an expert witness

affidavit could not be prepared and filed contemporaneously with the Complaint. On August 7, 1991 a second amended Complaint was filed with the required expert affidavit attached.

We have no choice but to dismiss this Complaint for failure to fulfill the contemporaneous filing requirements. O.C.G.A. 9-11-9.1(e) Plaintiff's first and second amendments to the original Complaint cannot cure this defect.

Plaintiff responds to this Motion to Dismiss by contending that first, the statute does not by its terms require a contemporaneous allegation of unavailability and second, the deposition attached to the original Complaint was sufficient to satisfy the requirements of O.C.G.A. 9-11-9.1. With both these contentions, we disagree.

Section b of O.C.G.A. 9-11-9.1 states, "The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alledged that an affidavit of an expert could not be prepared." The language of the statute reads very clearly. The requirement that the Plaintiff allege that time constraints have prevented the contemporaneous filing of an affidavit with the Complaint is mandatory, not permissive.

The plaintiff's contention that the deposition attached to the original Complaint was sufficient to satisfy the affidavit requirements of O.C.G.A. 9-11-

9.1 must also fail. O.C.G.A. 9-11-9.1(a) states, "In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."

The deposition attached to Plaintiff's original Complaint does not set forth the factual basis for the claim of malpractice. In fact, the deposition never mentions the particular Defendants involved in this case, let alone the acts of negligence they are alleged to have performed. The deposition of Dr. Benitez merely states that an introducer wire was left in the Plaintiff's body and that

failure to remove this wire in a patient upon withdrawal of a CVP line violates the standard of care generally accepted in the community. Dr. Benitez never states that she has reviewed the work performed by the particular Defendants in this matter and that their acts or failure to act fell below the standard of care generally accepted in the community. Allowing this particular deposition to fulfill the requirements of O.C.G.A. 9-11-9.1 would undermine the public policy of the statute which is "to require the plaintiff to 'set forth the particulars of the claim'" in order to prevent frivolous or unsustaninable malpractice actions. (cits.) Cheeley v. Henderson, 197 Ga. App. 543 (1990) reversed on other grounds, _____ Ga. _____ (1991).

We therfore **GRANT** the Defendant's Motion for Summary Judgment and **DISMISS** the Plaintif's Complaint for failure to comply with O.C.G.A. 9-11-9.1.

This 13th day of September, 1991.

Signature Affixed
Joel J. Fryer
Judge, Fulton Superior Court

Supreme Court of Georgia Decision

Dated 2/12/92

In The Supreme Court of Georgia

S92A0520 Christine Wright v. Crawford Long Hospital of Emory University Et Al.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

From the SUPERIOR COURT of FULTON COUNTY.

There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals. Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham, Fletcher, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme

Court of Georgia.

Witness my signature and the seal of said court affixed the day and year list above written.

(s/Lynn M. Stinchcomb, Deputy) Clerk.

Court of Appeals Decision Dated 9/8/92

In the court of Appeals of Georgia

A92A0964. WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY et. al. S-63

SOGNIER, Chief Judge.

Christine Wright brought a medical malpractice claim against Crawford Long Hospital and six physicians. Her complaint, as amended, was dismissed for noncompliance with OCGA 9-11-9.1, and she appeals.

In her complaint appellant alleged that defendants were liable for damages she incurred when an introducer wire was left in her body during catherization procedures performed in July 1989. Appellant attached to her complaint the deposition of Dr. Pamela Benitez, the surgeon who discovered and removed the wire in December 1989. In this

deposition, which was given in a Michigan lawsuit, Dr. Benitez testified that leaving a broken catheter threader wire in a patient's body violated the applicable standard of care. However, Dr. Benitez also stated that the wire she removed was not the kind of wire used to thread a catherization line and that she did not recognize the type of wire and was unable to identify a medical procedure in which such a wire would be used. In addition, Dr. Benitez testified that she had not reviewed appellant's medical records pertaining to the procedures performed by appellees and did not know the names of appellant's Georgia physicians.

Four days after filing her complaint, appellant amended it to allege that the statute of limitation would

expire within ten days of filing and that because of this time constraint she was unable to obtain the required affidavit before filing the complaint. Appellees raised the issue of noncompliance with OCGA 9-11-9.1 in their answers and motions to dismiss. In her second amendment to the complaint, filed 41 days after the complaint was filed, appellant attached the affidavit of Dr. Jose Evangelista, who averred that he had determined that appellees' treatment of appellant and had determined that appellees were negligent in failing to remove a catheter guide wire and in failing to so inform the appellant. The trial court dismissed the complaint on the basis that Dr. Benitez's deposition testimony did not satisfy the requirements of OCGA 9-11-9.1 (a) and that appellant could not amend the action

to add Dr. Evangelista's affidavit because the original complaint did not include the language required by OCGA 9-11-9.1 (b).

1. Contrary to appellant's contentions, the deposition did not meet the requirement of "set(ting) forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim, "OCGA 9-11-9.1 (a), as Dr. Benitez did not identify any negligent act committed by appellees and was unable even to speculate as to the source of the wire. See Piedmont Hospital, Inc. v. Milton, 189 Ga. App. 563, 564 (377 SE2d 198) (1988). Thus, the complaint as originally filed was subject to dismissal for noncompliance with OCGA 9-11-9.1.

2. Alternatively, appellant

contends she properly amended her complaint under OCGA 9-11-9.1 (b) or (c). The statute permits amendment of a complaint to add the required affidavit only in limited circumstances: (1) if the statute of limitation will expire within ten days and the plaintiff alleges that an expert affidavit could not be prepared because of time constraints (OCGA 9-11-9.1 (b)); or (2) if the court determines that the plaintiff was filed and the failure to file "was the result of a mistake" (id. at (e)). Paragraph (e) does not apply because Dr. Evangelista's affidavit was dated after suit was filed, and appellant does not contend the affidavit was available prior to filing. See Cheeley v. Henderson, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991); compare Hospital Authority of Fulton County v. McDaniel, 192 Ga. App. 398 (385 SE2d 8)

(1989). Paragraph (b) likewise is inapplicable because appellant did not allege in her original complaint that she was unable to obtain an affidavit because of time constraints, but instead alleged that the requisite affidavit -- the deposition of Dr. Benitez -- was attached to and filed with the complaint, but the deposition was insufficient.

Appellant maintains that under the liberal amendment provisions of OCGA 9-11-15, she was entitled to amend her complaint to add the allegations required by OCGA 9-11-9.1 (b) and then to file a second amendment to add the affidavit as contemplated by paragraph (b). We disagree, for in Cheeley, supra, the Supreme Court held that the contemporaneous filing requirement is mandatory and that the contemporaneous

filing requirement is mandatory and that the filing of an insufficient affidavit cannot be cured by amendment unless the requirements of paragraph (e) are met. As the court noted, paragraph (e) expressly states that the failure to comply with the contemporaneous filing requirement cannot be cured by amendment under OCGA 9-11-15 unless the affidavit was available prior to the filing of the complaint but was not filed due to a mistake. Cheeley, supra at 499. The legislature clearly has limited the manner in which OCGA 9-11-15 is applied in malpractice cases and has authorized amendment only in certain limited circumstances not present here.

Although this court reached a contrary result in Thompson v. Long, 201 Ga. App. 480 (411 SE2d 322) (1991), that

case involved a pro se plaintiff and applied the less stringent pleading standard used in pro se cases but not applicable here. Moreover, the Thompson plaintiff clearly had intended from the outset to proceed under paragraph (b) -- ie., to file the complaint just before the statute of limitation expired and then to obtain and file the affidavit thereafter -- but neglected to add the "magic language" in her pleading, id. at 482, whereas here appellant originally filed a deposition she alleged met the requirements of paragraph (a). Thus, this case, like Cheeley, "involves the misinterpretation of OCGA 9-11-9.1 (a). . . . Because of the misinterpretation, the requisite affidavit (filed with the complaint) failed to comply with OCGA 9-11-9.1 (a)." (Punctuation and citation omitted.)

Cheeley, supra at 498 (3). Accordingly, the trial court properly granted appellees' motions to dismiss.

3. Since the trial court did not rule on appellant's contentions that OCGA 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. In re Parrott, 194 Ga. App. 856 (392 SE2d 48) (1990).

Judgment affirmed. McMurray, P.J., and Cooper, J., concur.

Supreme Court of Georgia Decision

Dated 9/8/93

Case No. S93C0114
CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET. AL.

COURT OF APPEALS CASE NO. A92A0964

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., and Carley J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

Supreme Court of Georgia Decision

Dated 10/1/93

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S93C0114

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET. AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Hunt, P.J., and Carley, J., dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last

above written.

Sherie M. Welch, Clerk

Amendment 5 to the Constitution of the United States, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 7 to the Constitution of the United States, "In suits at common law, where the value in controversy shall

exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment 14, Section 1, to the Constitution of the United States, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

laws."

The Preamble of the Constitution of the State of Georgia of 1983, "To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon protection and guidance of Almighty God, do ordain and establish this Constitution."

Article 1, S 1, P 1 of the Constitution of the State of Georgia of 1983, "No person shall be deprived of life, liberty, or property except by due process of law."

Article 1, S 1, P 2 of the Constitution of the State of Georgia of 1983,

"Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Article 1, S 1, P 11 (a) of the Constitution of the State of Georgia of 1983, "(a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

Official Code of Georgia Annotated, Section 9-2-61, "**Renewal of case after**

dismissal.

(a) If a plaintiff discontinues or dismisses his case and recommences the same within six months, the renewed case shall stand upon the same footing, as to limitation, with the original case. However, this privilege of dismissal and renewal shall be exercised only once under this Code section.

(b) this Code section shall not apply to contracts for the sale of goods covered by Article 2 of Title 11."

Official Code of Georgia Annotated, Section 9-11-9.1, "**Affidavit to accompany charge of professional malpractice.**

(a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit

shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.

(c) If an affidavit is filed after the filing of a complaint, as allowed under

subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

(d) This Code section shall not be construed to extend any applicable period of limitation.

(e) Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite

affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises failure to file such an affidavit in its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake."

Official Code of Georgia Annotated, Section 9-11-15, "**Amended and supplemental pleadings.**

(a) Amendments. A party may amend his

pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. such amendment of the pleadings as may be necessary to cause them to conform to the

evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arises out of the

conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable

notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

Official Code of Georgia Annotated, Section 9-11-38, "The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."

NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANKLIN M. WRIGHT, Administrator Of The Estate of CHRISTINE WRIGHT, Deceased,

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., DAVID A. DAVIS, M.D., DAVID GREENE, M.D., and CHRISTOPHER WALLS, M.D.,

Respondents.

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the clerk of the Supreme Court of the United States, forty copies, and counsel for the Respondents in the

foregoing matter, a copy of the **PETITION FOR WRIT OF CERTIORARI**, by depositing same in the United States Mail in a properly addressed envelope, adequate postage thereon to:

Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543
(202) 479 - 3000

Sidney F. Wheeler, Esq.
J.M. Hudgins, IV, P.C.
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876 - 2700

John A. Gilleland, Esq.
Kimberly Logue Woodland, Esq.
LOVE AND WILLINGHAM
Suite 5050
One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
(404) 607 - 0100

Hunter S. Allen, Jr., Esq.
Bradley C. Reeves, Esq.
ALLEN AND PETERS
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 874 - 1700

Michael J. Bowers, Esq.
Attorney General - State of Georgia
132 State Judicial Building
42 Capital Square, S.W.
Atlanta, Georgia 30334
(404) 656 - 4585

Dated this 22nd day of December, 1993

Jonap & Associates, P.C.

By: _____
Arthur C. Nilsen
Georgia State Bar # 538860

COUNSEL FOR PETITIONER
Franklin M. Wright,
Administrator Of The
Estate of Christine
Wright, Deceased

1944 Clairmont Road
Decatur, Georgia 30033
(404) 320 - 6000

Supreme Court, U.S.
FILED
JAN 24 1994
OFFICE OF THE CLERK

PETITION NO. 93-1076

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

CHRISTINE WRIGHT,	:	
	:	
Petitioner,	:	
	:	
v.	:	PETITION
	:	NO. 93-1076
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREEN, M.D. and CHRISTOPHER WALLS, M.D.,	:	
	:	
Respondents.	:	

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF RESPONDENTS JOHN K. SCHELLACK, M.D. AND M. EDWYN HARRISON, III, M.D. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John A. Gilleland
Georgia Bar No. 294820
LOVE AND WILLINGHAM
Suite 5050
One Atlantic Center
1201 West Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 607-0100

Counsel of Record for Respondents
John K. Schellack, M.D. and
M. Edwyn Harrison, III, M.D.

QUESTIONS PRESENTED FOR REVIEW

The Respondents disagree with the Petitioner's statement of the questions for review, as there is no substantive federal question to be reviewed by this Court. The Petitioner never properly presented a constitutional issue to the Georgia trial or appellate courts, and therefore those courts never ruled on any such question. As such, there is no federal question for this Court to review.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i
TABLE OF CONTENTS.....ii
TABLE OF AUTHORITIES.....iii
STATEMENT OF JURISDICTION.....1
STATEMENT OF THE CASE.....2
SUMMARY OF THE ARGUMENT.....5
ARGUMENT AND CITATION OF AUTHORITY.....6

A. This Court Should Deny the Petition For Certiorari Because the Petitioner Never Presented and the State Courts Never Ruled On Any Federal or State Constitutional Issue and There Is No Federal Question For This Court to Review.....6

B. This Court Should Deny the Petition for Certiorari Because It Does Not Comply With This Court's Rules.....9

CONCLUSION.....10

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES **PAGE**

Bailey v. Anderson, 326 U.S. 203, 66 S. Ct. 66, 90 L.Ed. 3 (1945) 7

Ellis v. Dixon, 349 U.S. 458, 75 S. Ct. 850, 99 L.Ed. 1231 (1955) 1

Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 44 S. Ct. 164, 68 L.Ed. 413 (1924) 9

Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969) 5, 7

STATUTES

28 U.S.C.A. § 1257 (1993) 6, 7

O.C.G.A. § 9-11-9.1 (1993) 1, 2

RULES AND OTHER AUTHORITIES

United States Supreme Court Rule 10 ..... 1, 7

United States Supreme Court Rule 14 ..... 5, 9, 10

I. STATEMENT OF JURISDICTION

This Court should not accept jurisdiction of this appeal as it does not involve an important question of federal law which has not been, but should be, settled by this Court, nor does it involve a federal question decided by the Georgia courts in a way that conflicts with the applicable decisions of this Court. *See* Sup. Ct. R. 10.1(c). This Court lacks jurisdiction to review the judgment below because the Petitioner failed to timely or properly raise the questions sought to be reviewed in the Georgia courts and the Georgia courts therefore did not rule on the issues. *See Ellis v. Dixon*, 349 U.S. 458, 75 S. Ct. 850, 99 L.Ed. 1231 (1955).

II. STATEMENT OF THE CASE

The Petitioner filed this medical malpractice action in the Superior Court of Fulton County, Georgia on June 27, 1991, against John K. Schellack, M.D. ("Dr. Schellack"), M. Edwyn Harrison, III, M.D. ("Dr. Harrison"), numerous other doctors, and Crawford Long Hospital of Emory University in Atlanta, Georgia. In her complaint, the Petitioner alleged that the Respondents left a wire used during the insertion of a central line catheter in her body.

Under Georgia law, a plaintiff who files an action alleging medical malpractice must file with the complaint an affidavit of an expert competent to testify setting forth at least one negligent act against each defendant and the factual basis for each such claim of negligence. O.C.G.A. § 9-11-9.1(a) (1993). An exception to this procedural requirement arises when the plaintiff alleges that the statute of limitations will expire within ten days of the filing of the complaint and that,

because of such time constraints, an affidavit could not be obtained. In such cases, the statute grants the plaintiff an additional 45 days from the filing of the complaint in which to file the affidavit. O.C.G.A. § 9-11-9.1(b).[1]

Here, the Petitioner did not attach to her original complaint filed on June 27, 1991, an affidavit of an expert specifically alleging that either Dr. Schellack or Dr. Harrison negligently treated the Petitioner or the factual basis for any such claim of negligence. Rather, the Petitioner attached the deposition testimony of another physician taken in an unrelated case pending in Michigan. The Petitioner did not allege in the complaint that she could not obtain an expert affidavit because of time constraints due to the running of the statute of limitations, apparently because she thought the deposition testimony was sufficient.

In an amendment to the complaint filed on July 1, 1991, the Petitioner alleged for the first time that the statute of limitations would expire within ten days of the filing the complaint and she therefore could not obtain the requisite expert's affidavit. On August 7, 1991, the Petitioner filed a second amendment to the complaint, attaching the affidavit of yet another physician.

In their answers to the complaint, both Dr. Schellack and Dr. Harrison specifically raised the defense of the Petitioner's failure to comply with the requirements of O.C.G.A. § 9-11-9.1. On August 1, 1991, Dr. Schellack filed a

---

[1] The entire text of O.C.G.A. § 9-11-9.1 (1993) is set out in the Appendix at page J-1.

motion to dismiss the complaint for failure to comply with the statute. Dr. Harrison filed a similar motion on September 18, 1991.[2]

The Petitioner filed a response to Dr. Schellack's motion to dismiss on September 3, 1991. The response stated no federal or state constitutional challenge to O.C.G.A. § 9-11-9.1, the Georgia Constitution, or any other Georgia statute or rule. (*See* Appendix H.) The Honorable Joel J. Fryer of the Superior Court of Fulton County, Georgia heard oral arguments on September 4, 1991. The Petitioner failed to appear and, thus, raised no constitutional issue at the hearing.

On September 11, 1991, seven days after the hearing on the motion to dismiss, the Petitioner for the first time raised a constitutional challenge to O.C.G.A. § 9-11-9.1 by way of a supplemental brief. (*See* Appendix I.) The trial court issued the written order reflecting its decision on September 13, 1991, dismissing the Petitioner's case in its entirety for failure to comply with O.C.G.A. § 9-11-9.1. The trial court did not rule on the Petitioner's untimely constitutional challenge. (*See* Appendix G.)

Notwithstanding her failure to raise any constitutional challenges in the trial court, the Petitioner appealed to the Georgia Supreme Court. The Georgia Supreme Court determined that it had no jurisdiction to hear the appeal as evidenced

---

[2] The motion to dismiss was initially filed only on behalf of Dr. Schellack. The undersigned was subsequently retained to represent Dr. Harrison and filed a similar motion on his behalf. The trial court's order dismissing the complaint applied to all of the defendants.

by its February 12, 1992, order transferring the case to the Georgia Court of Appeals. (*See* Appendix E.) On February 25, 1992, the Petitioner filed a motion for reconsideration in the Georgia Supreme Court, again alleging that O.C.G.A. § 9-11-9.1 was unconstitutional. On March 12, 1992, the Supreme Court issued an order denying the motion for reconsideration. (*See* Appendix F.)

The Petitioner filed her brief in the Georgia Court of Appeals on March 4, 1992, alleging that the trial court inappropriately interpreted O.C.G.A. § 9-11-9.1 and improperly dismissed her complaint. She again made various constitutional attacks on O.C.G.A. § 9-11-9.1. In its decision dated September 8, 1992, the Georgia Court of Appeals affirmed the ruling of the trial court, holding that the trial court correctly applied O.C.G.A. § 9-11-9.1 and properly dismissed the Petitioner's complaint for failure to comply with that statute. (*See* Appendix C.) The Court of Appeals further stated:

> Since the trial court did not rule on [Petitioner's] contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990).

(*See* Appendix C at p. C-5.)

The Georgia Court of Appeals denied the Petitioner's motion for reconsideration of its decision on October 1, 1992. (*See* Appendix D.) The Petitioner subsequently filed a petition for certiorari to the Georgia Supreme Court, again raising constitutional challenges to O.C.G.A. § 9-11-9.1. The Georgia Supreme Court denied the petition for certiorari on

September 8, 1993, and denied the subsequent motion for reconsideration on October 1, 1993. (*See* Appendices A and B.)

The Petitioner now seeks a writ of certiorari from this Court, contending that the Georgia courts erred in some fashion by not ruling on the constitutional issues when, in fact, those issues were never properly raised in nor ruled upon by the Georgia trial or appellate courts. Her petition for certiorari should therefore be denied.

III. SUMMARY OF THE ARGUMENT

This Court should deny the petition for certiorari because there is no substantive federal question to be reviewed. The issues sought to be reviewed by the Petitioner were never presented to the Georgia courts, and the Georgia courts therefore never decided any of the issues set forth in the petition. This Court has no power to consider questions not preserved for appeal. *Street v. New York*, 394 U.S. 576, 581-82, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969).

This Court should further deny the petition because the Petitioner has failed to comply with Supreme Court Rule 14.5 requiring a petitioner to provide a clear and accurate presentation of the material necessary for this Court's review of the issues. The petition is neither clear nor accurate. Rather, it is incoherent. The petition should accordingly be denied on this ground as well.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. This Court Should Deny the Petition For Certiorari Because the Petitioner Never Presented and the State Courts Never Ruled On Any Federal or State Constitutional Issue and There Is No Federal Question For This Court to Review.

28 U.S.C.A. § 1257 (1993) provides the basis for this Court's jurisdiction when a petition for a writ of certiorari seeks review of the decision of a state court. That statute provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C.A. § 1257(a).

Rule 10 of the Supreme Court Rules expands on this jurisdictional requirement and lists considerations governing this Court's review on a writ of certiorari. That rule provides that a petition for a writ of certiorari shall be granted only

when there are "special and important reasons therefor." Sup. Ct. R. 10.1. Rule 10 sets out the reasons that will be considered in reviewing a petition, including:

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1(b), (c).

This petition satisfies none of these requirements. Here, the "federal question" sought to be reviewed by the Petitioner is the validity of the Georgia Constitution and the Georgia expert affidavit statute, O.C.G.A. § 9-11-9.1. In order for this Court to exercise its jurisdiction under 28 U.S.C.A. § 1257, however, the Court must first determine whether the federal question was even presented to the Georgia courts in such a manner that it was necessarily decided by them. "If the question was not so presented, then [this Court has] no power to consider it." *Street v. New York*, 394 U.S. 576, 582, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969). *See also Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S. Ct. 66, 90 L.Ed.2d 3 (1945); 28 U.S.C.A. § 1257(a).

In this case, the Georgia trial and appellate courts did not decide any federal question because none was properly presented for review. As the Court can determine from the materials set out in the Appendix, the Petitioner did not raise a constitutional challenge to O.C.G.A. § 9-11-9.1 until *after* the hearing on the motion to dismiss. Although much of the petition for certiorari is incomprehensible, the Petitioner herself admits that she raised a constitutional challenge to the Georgia statute for the first time in the supplemental brief filed in the trial court seven days after oral argument and just two days before the trial court issued its written order. (*See* Petition for Certiorari, p. 8.) The Petitioner *never* made a constitutional challenge, either state or federal, at any other time during the proceedings. The trial court accordingly did not rule upon the issue. (*See* Appendix G.)

The Georgia Supreme Court confirmed that the constitutional issue was not properly preserved as evidenced by its transfer of the Petitioner's appeal to the Georgia Court of Appeals for lack of jurisdiction. (*See* Appendix E.) Likewise, the Georgia Court of Appeals ruled that the constitutional challenges raised by the Petitioner presented nothing for appellate review because the trial court did not rule on those contentions. (*See* Appendix C at p. C-5.) The Georgia Supreme Court again confirmed that this appeal presented no constitutional issues for review by denying the petition for certiorari as well as the subsequent motion for reconsideration. (*See* Appendices A and B.)

In sum, the Petitioner cannot now be heard to argue that this Court should grant her a writ of certiorari when she failed to properly preserve, present, or argue those questions in the Georgia courts. Her petition should accordingly be denied.

B. This Court Should Deny the Petition for Certiorari Because It Does Not Comply With This Court's Rules.

Supreme Court Rule 14.5 provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

See also Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 509, 44 S. Ct. 164, 68 L.Ed. 413 (1924) (dismissing writ of certiorari as improvidently granted and pointing out the need for clear, definite and complete disclosure of the controversy when applying for certiorari).

There is nothing accurate, brief, or clear about the petition for certiorari filed in this case. Indeed, it is incomprehensible. It is impossible to determine from the Petitioner's brief exactly what is in controversy and, for this reason alone, the petition should be denied.

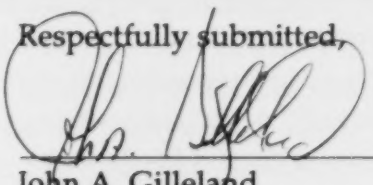
This is not the first time the Petitioner has failed to follow procedural rules. The underlying appeal was based on the Petitioner's failure to comply with a Georgia statute, O.C.G.A. § 9-11-9.1. The Petitioner also failed to comply with the procedural rules of the Georgia Court of Appeals regarding the time for filing motions for reconsideration. She repeatedly ignored the rules of the Georgia courts regarding serving opposing counsel with copies of her briefs, motions, and other pleadings.

As evidenced by her own petition, she has now failed to comply with the procedural rules of this Court. Her statement of the case is anything but concise, despite the mandate of Supreme Court Rule 14.1(g). She ignored the requirement of Rule 14.1(h) that she specify how the federal questions sought to be reviewed were raised in the state court. Finally, as discussed above, her petition is anything but clear and concise, as required by Rules 14.1(j) and 14.5. Her petition should be denied because of her failure to comply with the procedural rules of this Court and her apparent inability to present the issues sought to be reviewed in any coherent or clear manner.

V. CONCLUSION

For all of the above reasons, the Respondents John K. Schellack, M.D. and M. Edwyn Harrison, III, M.D. respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,



John A. Gilleland
State Bar No. 294820

Counsel of Record for
Respondents
John K. Schellack, M.D. and
M. Edwyn Harrison, III, M.D.

LOVE AND WILLINGHAM
Suite 5050
One Atlantic Center
1201 West Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 607-0100

PETITION NO. 93-1076

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CHRISTINE WRIGHT,	:	
	:	
Petitioner,	:	
	:	
v.	:	PETITION
	:	NO. 93-1076
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREEN, M.D. and CHRISTOPHER WALLS, M.D.,	:	
	:	
Respondents.	:	

CERTIFICATE OF SERVICE

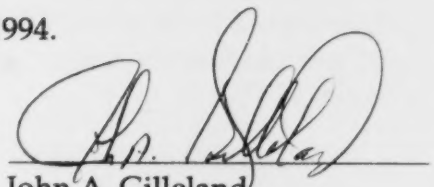
This is to certify that I have this day served counsel for all interested parties to this action with the Brief of Respondents John K. Schellack, M.D. and M. Edwyn Harrison, III, M.D. in Opposition to Petition for Writ of Certiorari by depositing three copies of same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to:

Arthur C. Nilsen, Esq.
JONAP & ASSOCIATES
1944 Clairmont Road
Decatur, Georgia 30033

J.M. Hudgins, IV, Esq.
Johnathan Krawcheck, Esq.
LONG, WEINBERG, ANSLEY
& WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

Bradley C. Reeves, Esq.
ALLEN & PETERS
Two Midtown Plaza
1360 Peachtree Street, N.E.
Suite 1700
Atlanta, Georgia 30309

This 24th day of January, 1994.



John A. Gilleland
State Bar No. 294820

Counsel of Record for
Respondents
John K. Schellack, M.D. and
M. Edwyn Harrison, III, M.D.

LOVE AND WILLINGHAM
Suite 5050
One Atlantic Center
1201 W. Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 607-0100

APPENDIX

APPENDIX A

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA
DATE: SEPTEMBER 08, 1993

Traci Green
LOVE AND WILLINGHAM
Suite 5050, One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309

Case No. S93C0114
CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

COURT OF APPEALS CASE NO. A92A0964

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., and Carley, J., who dissent.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX B

SUPREME COURT OF GEORGIA
ATLANTA OCTOBER 01, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93CO114

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

APPENDIX C

FIRST DIVISION
SOGNIER, C.J.
MCMURRAY, P.J., COOPER, J.
DATED: SEPTEMBER 08, 1992

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985)

In the Court of Appeals of Georgia

A92A0964. WRIGHT v. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY et al. S-63

SOGNIER, Chief Judge.

Christine Wright brought a medical malpractice claim against Crawford Long Hospital and six physicians. Her complaint, as amended, was dismissed for noncompliance with OCGA § 9-11-9.1, and she appeals.

In her complaint appellant alleged that defendants were liable for damages she incurred when an introducer wire was left in her body during catheterization procedures performed in July 1989. Appellant attached to her complaint the deposition of Dr. Pamela Benitez, the surgeon who discovered and removed the wire in December 1989. In this deposition, which was

given in a Michigan lawsuit, Dr. Benitez testified that leaving a broken catheter threader wire in a patient's body violated the applicable standard of care. However, Dr. Benitez also stated that the wire she removed was not the kind of wire used to thread a catheterization line and that she did not recognize the type of wire and was unable to identify a medical procedure in which such a wire would be used. In addition, Dr. Benitez testified that she had not reviewed appellant's medical records pertaining to the procedures performed by appellees and did not know the names of appellant's Georgia physicians.

Four days after filing her complaint, appellant amended it to allege that the statute of limitation would expire within ten days of filing and that because of this time constraint she was unable to obtain the required affidavit before filing the complaint. Appellees raised the issue of noncompliance with OCGA § 9-11-9.1 in their answers and motions to dismiss. In her second amendment to the complaint, filed 41 days after the complaint was filed, appellant attached the affidavit of Dr. Jose Evangelista, who averred that he had reviewed the records of appellees' treatment of appellant and had determined that appellees were negligent in failing to remove a catheter guide wire and in failing to so inform appellant. The trail court dismissed the complaint on the basis that Dr. Benitez's deposition testimony did not satisfy the requirements of OCGA § 9-11-9.1 (a) and that appellant could not amend the action to add Dr. Evangelista's affidavit because the original complaint did not include the language required by OCGA § 9-11-9.1 (b).

1. Contrary to appellant's contentions, the deposition did not meet the requirement of "set[ting] forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim," OCGA § 9-11-9.1 (a), as Dr. Benitez did not identify any negligent act committed by appellees and was unable even to speculate as to the source of the wire. See *Piedmont Hospital, Inc. v. Milton*, 189 Ga. App. 563, 564 (377 SE2d 198) (1988). Thus, the complaint as originally filed was subject to dismissal for noncompliance with OCGA § 9-11-9.1

2. Alternatively, appellant contends she properly amended her complaint under either OCGA § 9-11-9.1 (b) or (c). The statute permits amendment of a complaint to add the required affidavit only in limited circumstances: (1) if the statute of limitation will expire within ten days and the plaintiff alleges that an expert affidavit could not be prepared because of time constraints (OCGA § 9-11-9.1 (b)); or (2) if the court determines that the plaintiff had the requisite affidavit available before the complaint was filed and the failure to file "was the result of a mistake" (id. at (e)). Paragraph (e) does not apply because Dr. Evangelista's affidavit was dated after suit was filed, and appellant does not contend the affidavit was available prior to filing. See *Cheeley v. Henderson*, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991); compare *Hospital Authority of Fulton County v. McDaniel*, 192 Ga. App. 398 (385 SE2d 8) (1989). Paragraph (b) likewise is inapplicable because appellant did not allege in her original complaint that she was unable to obtain an affidavit because of time

constraints, but instead alleged that the requisite affidavit — the deposition of Dr. Benitez — was attached to and filed with the complaint, but the deposition was insufficient.

Appellant maintains that under the liberal amendment provisions of OCGA § 9-11-15, she was entitled to amend her complaint to add the allegations required by OCGA § 9-11-9.1 (b) and then to file a second amendment to add the affidavit as contemplated by paragraph (b). We disagree, for in *Cheeley*, supra, the Supreme Court held that the contemporaneous filing requirement is mandatory and that the filing of an insufficient affidavit cannot be cured by amendment unless the requirements of paragraph (e) are met. As the court noted, paragraph (e) expressly states that the failure to comply with the contemporaneous filing requirement cannot be cured by amendment under OCGA § 9-11-15 unless the affidavit was available prior to the filing of the complaint but was not filed due to a mistake. *Cheeley*, supra at 499. The legislature clearly has limited the manner in which OCGA § 9-11-15 is applied in malpractice cases and has authorized amendment only in certain limited circumstances not present here.

Although this court reached a contrary result in *Thompson v. Long*, 201 Ga. App. 480 (411 SE2d 322) (1991), that case involved a pro se plaintiff and applied the less stringent pleading standard used in pro se cases but not applicable here. Moreover, the *Thompson* plaintiff clearly had intended from the outset to proceed under paragraph (b) — i.e., to file the complaint just

before the statute of limitation expired and then to obtain and file the affidavit thereafter — but neglected to add the "magic language" in her pleading, id. at 482, whereas here appellant originally filed a deposition she alleged met the requirements of paragraph (a). Thus, this case, like *Cheeley*, "involves the misinterpretation of OCGA § 9-11-9.1 (a). Because of the misinterpretation, the requisite affidavit [filed with the complaint] failed to comply with OCGA § 9-11.9.1a." (Punctuation and citation omitted.) *Cheeley*, supra at 49[illegible] (3). Accordingly, the trial court properly granted appellees' motions to dismiss.

3. Since the trial court did not rule on appellant's contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. In re Parrott, 194 Ga. App. 856 (392 SE2d 48) (1990).

Judgment affirmed. McMurray, P.J., and Cooper, J., concur.

APPENDIX D

COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA, OCTOBER 01, 1992

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A92A0964

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF
THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA
DATED: OCTOBER 01, 1992

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,
Victoria McLaughlin

APPENDIX E

CASE NO. S92A0520

SUPREME COURT OF GEORGIA
ATLANTA FEBRUARY 12, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

From the SUPERIOR COURT of FULTON County.

There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals. Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham, Fletcher, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year list above written.

Lynn M. Stinchcomb, Deputy Clerk

APPENDIX F

SUPREME COURT OF GEORGIA
ATLANTA MARCH 12, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S92A0520

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	FILE NO. D-90848
vs.	:	
	:	
CRAWFORD LONG HOSPITAL	:	
OF EMORY UNIVERSITY,	:	
JOHN K. SCHELLACK, M.D.,	:	
CHRISTOPHER DOOLEY, M.D.,	:	
M. EDWYN HARRISON, III,	:	
M.D., WILLIAM A. DAVIS, M.D.,	:	
DAVID GREEN, M.D. and	:	
CHRISTOPHER WALLS, M.D.,	:	
	:	
Defendants.	:	

ORDER

Upon full consideration of the record, Defendants' Motion to Dismiss is hereby GRANTED.

Plaintiff filed this medical malpractice action against Crawford Long Hospital as well as six doctors alleging that the Defendants failed to remove an introducer wire used during the insertion of a central line catheter in Plaintiff's body on July 4, 1989. The Plaintiff

filed with her Complaint a deposition of Pamela Benitez, M.D., however, the Complaint did not include the expert affidavit required by O.C.G.A. § 9-11-9.1(a). Neither did the Plaintiff's Complaint allege that due to time constraints an expert affidavit could not be prepared and that Plaintiff would need the extra 45 days permitted by O.C.G.A. § 9-11-9.1(b).

On July 1, 1991, in an attempt to comply with the O.C.G.A. § 9-11-9.1 requirement, the Plaintiff filed an amended Complaint stating that due to time constraints an expert affidavit could not be prepared and filed contemporaneously with the Complaint. On August, 7, 1991, a second amended Complaint was filed with the required expert affidavit attached.

We have no choice but to dismiss this Complaint for failure to fulfill the contemporaneous filing requirements. Under O.C.G.A. § 9-11-9.1(e) Plaintiff's first and second amendments to the original Complaint cannot cure this defect.

Plaintiff responds to this Motion to dismiss by contending that first, the statute does not by its terms require a contemporaneous allegation of unavailability and second, the deposition attached to the original Complaint was sufficient to satisfy the requirements of O.C.G.A. § 9-11-9.1. With both these contentions we disagree.

Section b of O.C.G.A. 9-11-9.1 states, "The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which

the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared." The language of the statute reads very clearly. The requirement that the Plaintiff allege that time constraints have prevented the contemporaneous filing of an affidavit with the Complaint is mandatory, not permissive.

The Plaintiff's contention that the deposition attached to the original Complaint was sufficient to satisfy the affidavit requirements of O.C.G.A. § 9-11-9.1 must also fail. O.C.G.A. § 9-11-9.1(a) states, "In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."

The deposition attached to Plaintiff's original Complaint does not set forth the factual basis for the claim of malpractice. In fact, the deposition never mentions the particular Defendants involved in this case, let alone the acts of negligence they are alleged to have performed. The deposition of Dr. Benitez merely states that an introducer wire was left in the Plaintiff's body and that failure to remove this wire in a patient upon withdrawal of a CVP line violates the standard of care generally accepted in the community. Dr. Benitez never states that she has reviewed the work performed by the particular Defendants in this matter and that their acts or failure to act fell below the

standard of care generally accepted in the community. Allowing this particular deposition to fulfill the requirements of O.C.G.A. 9-11-9.1 would undermine the public policy of the statute which is "to require the plaintiff to 'set forth the particulars of the claim'" in order to prevent frivolous or unsustainable malpractice actions. (cits.) *Cheeley v. Henderson*, 197 Ga. App. 543 (1990) reversed on other grounds, _____ Ga. _____ (1991).

We therefore GRANT the Defendant's Motion for Summary Judgment and DISMISS the Plaintiff's Complaint for failure to comply with O.C.G.A. § 9-11-9.1.

This 13th day of SEPTEMBER, 1991.

JOEL J. FRYER
JUDGE, FULTON SUPERIOR COURT, A.J.C.

cc: John A. Gilleland, Esq.
Kimberly Logue Woodland, Esq.
LOVE AND WILLINGHAM
Suite 500
The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

William A. Dinges, Esq.
SILER & JONAP
P.O. Box 49006
Atlanta, Georgia 30359

Hunter S. Allen, Esq.
ALLEN & PETERS
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309

J.M. Hudgins
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

APPENDIX H

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	FILE NO.: D-90848
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. AND CHRISTOPHER WALLS, M.D.	:	

PLAINTIFF'S RESPONSE TO DEFENDANT SCHELLACK'S MOTION TO DISMISS

COMES NOW CHRISTINE WRIGHT, Plaintiff in the above captioned matter and herewith responds to Defendant's Motion to Dismiss as follows:

STATEMENT OF FACT:

This is a medical malpractice action which was filed on June 27, 1991. In the Complaint as originally

filed Plaintiff did not allege her inability to attach an expert's affidavit in accordance with OCGA 9-11-9.1(b).

By amendment dated June 28, 1991, and filed in office on July 1, 1991, Plaintiff set out her allegations in accordance with OCGA 9-11-9.1(b).

Within 45 days of the date of filing of the original Complaint, Plaintiff supplemented her Complaint in accordance with OCGA 9-11-9.1(b), by filing the affidavit of Jose L. Evangelista, M.D.

Defendant Schellack was served with Summons and Complaint on July 1, 1991. He filed his answer on August 2, 1991. Plaintiff was served with Schellack's Motion to Dismiss on August 5, 1991.

ARGUMENT AND CITATION OF AUTHORITY:

The gravamen of Defendant's Motion to Dismiss is found at page 4 of his brief. There Defendant states "...the failure to either file an expert's affidavit contemporaneously with the original Complaint or to allege in the original Complaint the need for additional time is a defect [sic] which can not be cured by amendment." (emphasis added).

Defendant's assertion does not accurately set out the requirements contained in OCGA 9-11-9.1(b). The statute states: "...The contemporaneous filing requirements of subsection (a) of this Code section shall not apply to any case in which the period of limitation will

expire within ten days of the date of filing and, because of such time constraints, the Plaintiff has alleged that an affidavit of an expert could not be prepared." The statute then goes on to set out the time requirement for supplementation of the pleadings with the affidavit.

Plaintiff suggests, with all due respect, that the Defendant has engrafted onto the statute a requirement that simply is not there. The statute talks in terms of a "contemporaneous filing requirement" with reference to the expert's affidavit itself. The statute does not by its terms require a "contemporaneous allegation" of unavailability. The statute merely requires that the Plaintiff allege the operative circumstances described in subsection (b) regarding the unavailability of the affidavit.

Here, Plaintiff has made no effort to amend an expert's affidavit. Nor has she amended to add an affidavit. Rather, Plaintiff amended her Complaint to set out those exigent statutory circumstances which would permit her to later supplement her Complaint as originally filed. Under these circumstances, Plaintiff respectfully suggests that OCGA 9-11-15 is applicable and that her amendment would relate back to the date of the original Complaint. Defendant's Motion should, therefore, be denied.

The Defendant further contends that the deposition attached to the complaint as Exhibit A was not sufficient to satisfy the requirements of OCGA 9-11-9.1. This position is also unsound.

Defendant does not contend that a deposition cannot be used in place of an affidavit. Nor can he. *See, e.g., Hospital Authority of Fulton County v. McDaniel*, 192 Ga. App. 398, 385 SE2d 8 (1989). As the Court stated in McDaniel: "The purpose of the Code requirement is to ensure a substantial basis for actions against professionals." 385 SE2d at 9. Plaintiff suggests that the Benitez deposition does show a "substantial basis" for this suit.

The deposition shows the following: Dr. Benitez is a board certified surgeon licensed to practice medicine in Michigan (pp. 6-7); She first saw the plaintiff on November 13, 1987 at Wayne State University, University Surgeons (p. 10); On November 13, 1987, a chest x-ray was performed which did not show the presence of a foreign object in Plaintiff's right subclavicular fossa (pp. 25-6); X-rays of Plaintiff's chest were taken on January 26, 1988, which did not show the presence of a foreign object in Plaintiff's right subclavicular fossa (pp. 34-5); X-rays taken on April 29, 1988 did not show the foreign body but would have had it existed at that time (p. 37); On December 13, 1989, She performed surgery on the Plaintiff to remove a 50 cm metal wire from Plaintiff's right subclavicular fossa (pp. 11-2); In her opinion the wire got into Plaintiff's body after November 13, 1987 (p. 27); Plaintiff was treated during that time at Wayne State University and at a hospital in Georgia (p. 27, p. 29, p. 40); As far as she knew, no invasive procedures were performed at Wayne State University (p. 27); It would violate the standard of care to leave a threader wire in a patient (p. 39);

"The purpose of OCGA 9-11-9.1 is to reduce the number of frivolous malpractice suits being filed, not to require a plaintiff to prove a prima facie case entitling him to recover... ." *0-1 Doctors Memorial Holding Co. v. Moore*, 190 Ga. App. 286, 378 SE2d 708, 710 (1989). Given this benchmark, Plaintiff respectfully suggests that the deposition of Dr. Benitez complies with, at least, the spirit of OCGA 9-11-9.1.

For the foregoing reasons, Plaintiff suggests that Defendant's motion has no merit and should be denied.

This the 2nd day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
Georgia Bar No.: 222575

P.O. Box 49006
Atlanta, Georgia 30359-1006
(404) 321-1000

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	FILE NO.: D-90848
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. AND CHRISTOPHER WALLS, M.D.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have this date served true and correct copies of the foregoing upon:

Sidney F. Wheeler, Esq.
J. M. Hudgins, IV, P.C.
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

John A. Gilleland, Esq.
Kimberly Logue Woodland, Esq.
LOVE AND WILLINGHAM
Suite 500
The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

Hunter S. Allen, Jr. Esq.
Bradley C. Reeves, Esq.
ALLEN & PETERS
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309

by affixing sufficient first class postage to same and depositing same in the United States mail.

This the 2nd day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
Georgia State Bar No.: 222575

Post Office Box 49006
Atlanta, Georgia 30359
(404) 321-1000

APPENDIX I

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	FILE NO.: D-90848
	:	
CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. AND CHRISTOPHER WALLS, M.D.	:	
	:	
Defendants.	:	

PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANT SCHELLACK'S MOTION TO DISMISS

COMES NOW CHRISTINE WRIGHT, Plaintiff in the above-captioned matter, and herewith supplements her Response to Defendant Schellack's Motion to Dismiss as follows:

This matter was set for oral argument on September 4, 1991, but because of calendar conflicts, the undersigned was committed to appear before Judge Robins in DeKalb State Court on another motion as set out in his conflict letter. It was agreed to submit the motion to the Court on briefs.

ARGUMENT AND CITATION OF AUTHORITY:

In addition to the reasons set out in her original response, Plaintiff suggests that Defendant's motion should be denied because the basis of the motion, OCGA 9-11-9.1., is unconstitutional.

The Constitution of the State of Georgia, Art. II, Sec. V, Par. III, states: "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof."

The purpose of this constitutional provision is to protect against surprise legislation. *Mead Corp. v. Collins*, 258 Ga. 239, 367 SE2d 790 (1988). OCGA 9-11-9.1 totally fails in this regard. The statute by its terms refers only to the affidavit filing requirement. The statute does not warn of the dire substantive consequences which result from the failure to follow the requirements exactly.

Further, Plaintiff suggests that the language of the statute is so vague that persons of ordinary intelligence are forced to guess at its meaning. Such guesswork is at that persons' peril. Any defects in the affidavit are not amenable and, thus, the effects of the statute become

capricious and arbitrary. A plaintiff who guesses wrong would be irrevocably out of court. Certainly this violates all notions of fair play and substantial justice.

For the foregoing additional reasons Plaintiff respectfully suggests that Defendant's motion should be dismissed.

This the 11th day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
Georgia Bar No.: 222575

P.O. Box 49006
Atlanta, Georgia 30359-1006
(404) 321-1000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have this date served true and correct copies of the foregoing upon:

Sidney F. Wheeler, Esq.
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

John A. Gilleland, Esq.
Suite 500
The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

Hunter S. Allen, Jr., Esq.
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309

by affixing sufficient first class postage to same and depositing same in the United States mail.

This the 11th day of September, 1991.

SILER & JONAP
Attorneys for Plaintiff

BY: William A. Dinges
Georgia State Bar No.: 222575

APPENDIX J

O.C.G.A. § 9-11-9.1. Affidavit to accompany charge of professional malpractice.

(a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.

(c) If an affidavit is filed after the filing of a complaint, as allowed under subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

(d) This Code section shall not be construed to extend any applicable period of limitation.

(e) Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this Code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake. (Code 1981, § 9-11-9.1, enacted by Ga. L. 1987, § 3; Ga. L. 1989, p. 419, § 3.)

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JAN 26 1994
CLERK OF THE SUPREME

(3)

No. 93-1076

In The

Supreme Court of the United States

October Term, 1993

FRANKLIN M. WRIGHT,
Administrator of the Estate of
CHRISTINE WRIGHT, *Deceased,*

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., DAVID A. DAVIS, M.D., DAVID GREENE, M.D. and CHRISTOPHER WALLS, M.D.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, CHRISTOPHER DOOLEY, M.D. AND CHRISTOPHER WALLS, M.D.

John M. Hudgins IV, P.C.
LONG WEINBERG, ANSLEY & WHEELER
999 Peachtree Street
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

Attorneys for Respondents
Crawford Long Hospital of Emory University, Christopher Dooley, M.D. and Christopher Walls, M.D.

14 pp

I. QUESTIONS PRESENTED

1. Whether Petitioner failed to timely and properly raise constitutional questions in the Georgia state court system?

2. Whether O.C.G.A. § 9-11-9.1 is constitutional?

II. TABLE OF CONTENTS

		Page
I.	QUESTIONS PRESENTED	i
II.	TABLE OF CONTENTS	ii
III.	TABLE OF AUTHORITIES	iii
IV.	STATEMENT OF JURISDICTION	v
V.	STATEMENT OF THE CASE	1
VI.	SUMMARY OF ARGUMENT	2
VII.	REASONS FOR DENYING THE PETITION	2
A.	Petitioner failed to properly raise any federal issues in the Georgia courts	2
B.	O.C.G.A. § 9-11-9.1 is constitutional	4
VIII.	CONCLUSION	8

III. TABLE OF AUTHORITIES

Page

I. Cases

Allrid v. Emory Univ., 249 Ga. 35, 285 S.E.2d 521 (1982) .. 5

Bentley v. Anderson-McGriff Hardware Co., 181 Ga. 813, 184 S.E. 297 (1935) 3

Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989) 5

Brown v. State, 114 Ga. 60, 39 S.E. 873 (1901) 3

Calhoun v. State, 211 Ga. 112, 84 S.E.2d 198 (1954) 3

Campbell v. J.D. Jewell, Inc., 220 Ga. 400, 139 S.E.2d 161 (1964) 2

Carindale v. Louisiana, 394 U.S. 437 (1969) 3

Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972) 7

Eberhart v. Morris Brown College, 181 Ga. App. 516, 352 S.E.2d 832 (1987) 6

Ellett v. City of College Park, 233 Ga. 858, 213 S.E.2d 700 (1975) 2

Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989) 7

Gadd v. Wilson & Co., Eng'rs & Architects, 262 Ga. 234, 416 S.E.2d 285 (1992) 4

Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990), *cert. denied, Green v. Georgia*, ___ U.S. ___ (1991) 7

Griggs v. State, 130 Ga. 16, 60 S.E. 103 (1908) 3

Gronne v. Abrams, 793 F.2d 74 (2d Cir. 1986) 6

Hamby v. Neurological Assocs., P.C., 243 Ga. 698, 256 S.E.2d 378 (1979) 5

Herndon v. State, 179 Ga. 597, 176 S.E. 620 (1934) 3

Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) ... 5

Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964) 3

Jones v. Union Guano Co., 264 U.S. 171 (1924) 6

Kenney v. Piedmont Hosp., 136 Ga. App. 660, 222 S.E.2d 162 (1975) 6

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 6

	Page
LoGiudice v. State, 251 Ga. 711, 309 S.E.2d 355 (1983), *cert. denied, LoGiudice v. Georgia*, 466 U.S. 950 (1984)	7
Monks v. New Jersey, 398 U.S. 71 (1970)	3
Oregon v. Hass, 420 U.S. 714 (1975)	7
Phillips v. National Ben Franklin Ins. Co., 229 Ga. 258, 190 S.E.2d 916 (1972)	2
Reed v Reed, 404 U.S. 71 (1971)	5
Shea v. Phillips, 213 Ga. 269, 98 S.E.2d 552 (1957)	6
State v. Miller, 260 Ga. 669, 398 S.E.2d 547 (1990)	7
Street v. New York, 394 U.S. 576 (1969)	3
Webb v. Webb, 451 U.S. 493 (1981)	3
Willingham v. Lee, 227 Ga. 425, 181 S.E.2d 49 (1971)	3
Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979)	5
II. Other Authorities	
O.C.G.A. § 9-11-9.1	passim
28 U.S.C. § 1257	4

IV. STATEMENT OF JURISDICTION

Respondents show that Petitioner has failed to properly invoke this Court's jurisdiction. Petitioner has not timely and properly raised a state or federal constitutional question in the Superior Court of Fulton County, State of Georgia, the Georgia Court of Appeals or the Georgia Supreme Court. *See* App. pp. A1-A7, B1-B2, C9 of Petition For Writ Of Certiorari (hereinafter "Petition"). Additionally, Petitioner has not cited any statutory provision conferring jurisdiction on this Court in his Petition as required by Rule 14.1(e)(iv) of the Rules of the Supreme Court.

V. STATEMENT OF THE CASE

On June 27, 1991, Christine Wright filed this medical malpractice action in the Superior Court of Fulton County, Georgia. On August 1, 1991, Respondent John K. Schellack, M.D. filed his Motion to Dismiss the Complaint for Petitioner's failure to comply with O.C.G.A. § 9-11-9.1. On September 13, 1993, an Order granting the Motion to Dismiss was entered in the Superior Court of Fulton County, Georgia. App. pp. A1-A7 of Petition.

On October 2, 1991, Petitioner filed a Notice of Appeal to the Georgia Supreme Court. The Georgia Supreme Court found there was no basis for original jurisdiction in the Georgia Supreme Court because no constitutional issues were properly raised in the appeal. As a result, on February 2, 1992, the case was transferred to the Georgia Court of Appeals. App. p. B1-B2 of Petition. On February 21, 1992, Petitioner filed a Motion for Reconsideration with the Georgia Supreme Court of its order transferring the case to the Georgia Court of Appeals. On March 12, 1992, the Georgia Supreme Court denied that Motion for Reconsideration.

In the Georgia Court of Appeals, Petitioner argued, *for the first time,* that O.C.G.A. § 9-11-9.1 violates the equal protection and due process clauses of the Georgia and United States Constitutions. On September 8, 1992, the Georgia Court of Appeals affirmed the trial court's order dismissing Petitioner's Complaint for the failure to comply with the provisions of O.C.G.A. § 9-11-9.1. App. pp. C1-C9 of Petition. In its opinion, the Georgia Court of Appeals noted that Petitioner's contentions that O.C.G.A. § 9-11-9.1 is unconstitutional were not properly raised in the appeal. App. p. C9 of Petition. On September 24, 1992, Petitioner filed an untimely Motion for Reconsideration of the Georgia Court of Appeals' decision. That untimely Motion for Reconsideration was denied on October 1, 1992.

On October 20, 1992, Petitioner filed a Petition for Certiorari in the Georgia Supreme Court. On September 8, 1993, that

Petition for Certiorari was denied. App. p. D1 of Petition. On September 17, 1993, Petitioner filed a Motion for Reconsideration of the denial of the Petition for Certiorari. That Motion for Reconsideration was denied on October 1, 1993. App. pp. E1-E2 of Petition. Thereafter, on December 29, 1993, Petitioner filed this Petition for Writ of Certiorari.

VI. SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because Petitioner has failed to timely and properly raise any issue with regard to the constitutionality of O.C.G.A. § 9-11-9.1. Petitioner's arguments that O.C.G.A. § 9-11-9.1 is unconstitutional were not ruled upon by the Superior Court of Fulton County, Georgia or either of the Georgia appellate courts. Since the Georgia Supreme Court has not been afforded the opportunity to decide a federal or state constitutional issue, this Court is without jurisdiction to consider these issues.

This Petition for Certiorari should also be denied because O.C.G.A. § 9-11-9.1 is constitutional. O.C.G.A. § 9-11-9.1 was enacted for the legitimate purpose of reducing frivolous professional malpractice actions in Georgia. Moreover, the requirements of O.C.G.A. § 9-11-9.1 are rationally related to this legitimate purpose.

VII. REASONS FOR DENYING THE PETITION

A. Petitioner failed to properly raise any federal issues in the Georgia courts.

The Georgia Supreme Court has consistently held that it will not consider the constitutionality of an act of the Georgia General Assembly unless it clearly appears that the constitutional issue was directly and properly raised in the trial court and distinctly passed on by the trial judge. *Ellett v. City of College Park*, 233 Ga. 858, 213 S.E.2d 700 (1975); *Phillips v. National Ben Franklin Ins. Co.*, 229 Ga. 258, 190 S.E.2d 916 (1972); *Campbell v.*

J.D. Jewell, Inc., 220 Ga. 400, 139 S.E.2d 161 (1964); *Calhoun v. State*, 211 Ga. 112, 84 S.E.2d 198 (1954); *Bentley v. Anderson-McGriff Hardware Co.*, 181 Ga. 813, 184 S.E. 297 (1935); *Herndon v. State*, 179 Ga. 597, 176 S.E. 620 (1934); *Griggs v. State*, 130 Ga. 16, 60 S.E. 103 (1908); and *Brown v. State*, 114 Ga. 60, 39 S.E. 873 (1901). Merely raising a constitutional issue, which is not distinctly passed upon in the trial court is insufficient to constitute a basis for appeal in the Georgia appellate courts. *Calhoun, supra; Herndon, supra.* Therefore, a constitutional issue which is either intentionally or unintentionally omitted by the trial court does not give rise to an appealable issue in Georgia. *Willingham v. Lee*, 227 Ga. 425, 181 S.E.2d 49 (1971).

It is clear from the trial court's order dismissing the Petitioner's Complaint for failing to comply with O.C.G.A. § 9-11-9.1 that the trial court did not rule on any constitutional issues. *See* App. pp. A1-A7 of Petition. Based upon the trial court's failure to rule on any constitutional issue, the Georgia Supreme Court found that it did not have jurisdiction over the appeal and transferred the case to the Georgia Court of Appeals. App. pp. B1-B2 of Petition. The Georgia Court of Appeals specifically refused to consider Petitioner's constitutional arguments, "[s]ince the trial court did not rule on [Petitioner's] contentions that O.C.G.A. § 9-11-9.1 is unconstitutional . . . ." App. p. C9 of Petition. Thus, it is clear from the actions, orders and opinions of the Georgia courts that Petitioner did not properly raise any constitutional issues.

This Court has steadfastly refused to consider constitutional issues that are not properly raised in the state court. *Webb v. Webb*, 451 U.S. 493 (1981); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Street v. New York*, 394 U.S. 576 (1969); *Carindale v. Louisiana*, 394 U.S. 437 (1969); and *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964). In *Webb, supra*, the petitioner sought an answer to the question of whether the United States Constitution demanded that Georgia give full faith and credit to a Florida custody decree. The petitioner in *Webb*, however, failed to raise the federal full faith and credit issue in the trial court and

the Georgia Supreme Court did not mention the federal question in its opinion. This Court noted that in such instances "it will be assumed that the omission was due to want of proper presentation in the state courts," unless it can be affirmatively demonstrated to the contrary. *Id.* at 495. Since the Georgia Supreme Court did not mention, let alone decide, the federal constitutional issue as required in order to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257, and the petitioner could not affirmatively demonstrate that the federal full faith and credit issue was in fact raised in the Georgia courts, this Court concluded it was without jurisdiction and dismissed the writ of certiorari. *Id.* at 501-2.

Similar to the situation in *Webb, supra,* this Petitioner failed to properly raise any constitutional issues while this case was pending in Georgia. Rather than not mentioning Petitioner's constitutional arguments, the Georgia Court of Appeals specifically noted Petitioner's failure to properly raise any constitutional issues. App. p. C9 of Petition. Since the Georgia appellate courts did not have the opportunity to review any constitutional issues in this case, this Court is without jurisdiction to consider the instant Petition for Writ of Certiorari. Accordingly, this Petition for Writ of Certiorari should be denied.

B. O.C.G.A. § 9-11-9.1 is constitutional.

O.C.G.A. § 9-11-9.1 requires a professional malpractice claimant to file the affidavit of an expert competent to testify along with a complaint for damages. The affidavit must specifically set forth at least one negligent act or omission claimed to exist and the factual basis for each such claim. O.C.G.A. § 9-11-9.1(a). The purpose of this requirement is to reduce the number of frivolous professional malpractice suits in Georgia. *Gadd v. Wilson & Co., Eng'rs & Architects,* 262 Ga. 234, 416 S.E.2d 285 (1992).

The requirement that professional malpractice claimants file an expert affidavit with their complaint does not violate Petitioner's equal protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution. Although there

are three levels of scrutiny in the equal protection analysis, the rational basis test applies to situations where a statute is challenged that differentiates between litigants. *See Boyd v. Bulala,* 877 F.2d 1191, 1197 (4th Cir. 1989); *Woods v. Holy Cross Hosp.,* 591 F.2d 1164, 1173 (5th Cir. 1979). In *Hoffman v. United States,* 767 F.2d 1431, 1436 (9th Cir. 1985), it was argued that a California statute limiting recovery for noneconomic damages in medical malpractice suits to $250,000.00 violated the equal protection clause of the federal constitution. Since the statute involved neither a suspect classification nor a fundamental right, the Ninth Circuit Court of Appeals concluded that the rational basis test was the appropriate level of scrutiny to apply in their equal protection analysis of the statute. *See also Allrid v. Emory Univ.,* 249 Ga. 35, 285 S.E.2d 521 (1982) (rational basis test applied to shorter statute of limitations for medical malpractice cases involving foreign objects and all other medical malpractice cases in Georgia); *Hamby v. Neurological Assocs., P.C.,* 243 Ga. 698, 256 S.E.2d 378 (1979) (rational basis test applied to shorter statute of limitations on loss of consortium claims in medical malpractice context and all other loss of consortium claims in Georgia).

The rational basis test requires that state statutes "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v Reed,* 404 U.S. 71 (1971). In *Hoffman, supra,* the California statute placing a ceiling on noneconomic damages in medical malpractice cases survived this rational basis analysis. The court held that the statute was reasonably related to the legitimate purposes of reducing malpractice insurance premiums and improving the quality of health care provided to the people of California. *Id.* at 1437. O.C.G.A. § 9-11-9.1 survives the rational basis test in a similar fashion. The requirement that an affidavit of an expert be filed with the complaint reasonably furthers the legitimate goal of reducing groundless malpractice lawsuits in Georgia by requiring that professional malpractice claimants have an expert examine their case before suit is filed. Accordingly, O.C.G.A. § 9-11-9.1 does not violate the equal

protection clause contained in the Fourteenth Amendment to the United States Constitution.

O.C.G.A. § 9-11-9.1 also does not violate Petitioner's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. This Court has held that a state has broad power to enact procedural requirements with which a claimant must comply in order to take advantage of the adjudicatory process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Moreover, a state is not prevented from prescribing a reasonable and appropriate condition precedent to the proceeding of a lawsuit of a specified kind. *Jones v. Union Guano Co.*, 264 U.S. 171 (1924). In *Gronne v. Abrams*, 793 F.2d 74, 77 (2d Cir. 1986), a New York statute requiring submission of medical malpractice claims to a malpractice panel for a hearing on liability before proceeding to trial was challenged on due process grounds. The court concluded that the statute, by allowing the parties the opportunity to mediate a settlement, if warranted, was a reasonable legislative response to increasing malpractice rates and the eroding quality of health care provided to the residents of New York. Thus, the statute did not violate medical malpractice claimants' due process rights. *Id.* at 77-78.

O.C.G.A. § 9-11-9.1 is also a reasonable condition precedent to filing a medical malpractice lawsuit in Georgia. As demonstrated above, O.C.G.A. § 9-11-9.1, by requiring potential medical malpractice claimants to have an expert review their case prior to filing a lawsuit, is reasonably related to the legitimate object of decreasing the number of frivolous malpractice suits filed in Georgia. The reasonableness of this requirement is further demonstrated by the fact that Georgia law requires expert testimony for a professional malpractice claim to survive a motion for directed verdict at trial. *See Shea v. Phillips*, 213 Ga. 269, 98 S.E.2d 552 (1957); *Eberhart v. Morris Brown College*, 181 Ga. App. 516, 352 S.E.2d 832 (1987); and *Kenney v. Piedmont Hosp.*, 136 Ga. App. 660, 222 S.E.2d 162 (1975). Thus, O.C.G.A. § 9-11-9.1 is a reasonable condition precedent to filing a medical malpractice lawsuit in Georgia. Accordingly, O.C.G.A.

§ 9-11-9.1 does not violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Finally, Petitioner argues that the Georgia Constitution, and the manner in which it has been interpreted by the Georgia Supreme Court, is unconstitutional because it provides greater protections than, and is not subsidiary to, the United States Constitution. Petition, pp. 27-28. It is well settled, however, that states may interpret their constitutions to provide greater rights than the federal constitution. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975); *State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990); Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990), *cert. denied, Green v. Georgia*, ____ U.S. ____ (1991); *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989); *LoGiudice v. State*, 251 Ga. 711, 309 S.E.2d 355 n.6 (1983), *cert. denied, LoGiudice v. Georgia*, 466 U.S. 950 (1984); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972). Thus, Petitioner's argument that "this case is ripe for judicial review" because the Georgia Supreme Court is providing greater protections to the citizens of Georgia than the federal constitution is illusory and without merit.

VIII. CONCLUSION

Petitioner failed properly raise any federal or state constitutional issues in the Georgia courts, and thus, this Petition for Writ of Certiorari should be denied. Additionally, O.C.G.A. § 9-11-9.1 does not violate the equal protection and due process clauses of the United States Constitution. For this additional reason, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,
LONG, WEINBERG, ANSLEY & WHEELER

By:
John M. Hudgins IV, P.C.

999 Peachtree Street
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

Attorneys for Respondents
Crawford Long Hospital of Emory University, Christopher Dooley, M.D. and Christopher Walls, M.D.

93-1076

FILED
JAN 27 1994
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRANKLIN M. WRIGHT, Administrator of the Estate of CHRISTINE WRIGHT, Deceased,

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. and CHRISTOPHER WALLS, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF RESPONDENTS WILLIAM A. DAVIS, M.D. AND DAVID GREENE, M.D. IN OPPOSITION

Bradley C. Reeves
Counsel of Record

Gary R. McCain
ALLEN & PETERS
1360 Peachtree Street, N.E.
Two Midtown Plaza
Suite 1700
Atlanta, Georgia 30309
(404) 874-1700

Attorneys for Respondents William A. Davis, M.D. and David Greene, M.D.

48 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether this Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) to grant a writ of certiorari, when no court of the State of Georgia in the proceedings below passed upon or addressed in any manner the constitutionality of the Georgia statute at issue, O.C.G.A. § 9-11-9.1, under the United States Constitution.

(2) Notwithstanding the lack of jurisdiction, whether any issue deserving of this Court's consideration is presented regarding the constitutionality of O.C.G.A. § 9-11-9.1.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS AND ORDERS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT FOR DISMISSING OR DENYING THE WRIT 8

ARGUMENT FOR DISMISSING OR DENYING THE WRIT 9

CONCLUSION 22

APPENDIX

A. Order of the Superior Court of Fulton County, Georgia, dated September 13, 1991 ..... A1

B. Order of the Supreme Court of Georgia, dated February 12, 1992 ..... B1

C. Order of the Supreme Court of Georgia, dated March 12, 1992 ..... C1

D. Opinion of the Court of Appeals of Georgia, dated September 8, 1992 ..... D1

E. Order of the Court of Appeals of Georgia, dated October 1, 1992 ..... E1

F. Denial of Petition for Certiorari of the Supreme Court of Georgia, dated September 8, 1993 ..... F1

G. Order of the Supreme Court of Georgia, dated October 1, 1993 ..... G1

TABLE OF AUTHORITIES

CASES

0-1 Doctors Memorial Holding Co. v. Moore,
190 Ga. App. 286, 378 S.E.2d 708 (1989).....18

Adair v. Traco Division,
192 Ga. 59, 14 S.E.2d 466 (1941).....12

Allrid v. Emory University,
249 Ga. 35, 285 S.E.2d 521 (1982).....20

Archie v. Scott,
190 Ga. App. 145, 378 S.E.2d 182 (1989) 13, 14

Bailey v. Anderson,
326 U.S. 203 (1945) 10, 16

Bankers Life & Casualty Co. v. Crenshaw,
486 U.S. 71 (1988) 10, 16

Bentley v. Anderson-McGriff Hardware Co.,
181 Ga. 813, 184 S.E.297 (1935).....13

Bowen v. Adams,
203 Ga. App. 123, 416 S.E.2d 102 (1992) 18, 20

Brown v. State,
114 Ga. 60, 39 S.E. 873 (1901).....13

Burson v. State,
183 Ga. App. 647, 359 S.E.2d 731 (1987) 15

Calhoun v. State,
211 Ga. 112, 84 S.E.2d 198 (1954) 13, 14

Cardinale v. Louisiana,
394 U.S. 437 (1969) 10, 11, 16

Dandridge v. Williams,
397 U.S. 471 (1970) 17

Dunaway v. Gore,
164 Ga. 219, 138 S.E. 213 (1927) 14

Eilenbecker v. Plymouth Co.,
134 U.S. 31 (1890) 19

Georgia-Florida Ry. v. Newton,
140 Ga. 463, 79 S.E. 142 (1913) 13

Hamby v. Neurological Associates, P.C.,
243 Ga. 698, 256 S.E.2d 378 (1979) 20

Hill v. California,
401 U.S. 797 (1971) 11

Housing Authority of Savannah v. Greene,
259 Ga. 435, 383 S.E.2d 867 (1989) 18, 20

Iacaponi v. New Amsterdam Cas. Co.,
258 F.Supp. 880 (D. Pa. 1966), *aff'd*, 379 F.2d
311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 19

Illinois v. Gates,
462 U.S. 213 (1983) 10, 11, 16

In re Parrott,
194 Ga. App. 856, 392 S.E.2d 48 (1990) 7, 12

Jones v. Union Guano Co.,
264 U.S. 171 (1923) 18

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 21

Maryland v. Baltimore Radio Show, Inc.,
338 U.S. 912 (1950) 12

McGoldrick v. Compagnie Generale Transatlantique,
309 U.S. 430 (1940) 10

Mellon v. O'Neil,
275 U.S. 212 (1927) 10

Monks v. New Jersey,
398 U.S. 71 (1970) 16

O'Connor v. Nevada,
507 F.Supp. 546 (D. Nev. 1981), *aff'd*, 686 F.2d
749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071 19

Perry v. Atlanta Hospital & Medical Center, Inc.,
255 Ga. 431, 339 S.E.2d 264 (1986) 20

Philyaw v. Fulton National Bank,
139 Ga. App. 28, 227 S.E.2d 811 (1976) 13, 14

Reed v. Reed,
404 U.S. 71 (1971) 19

Richardson v. Belcher,
404 U.S. 78 (1971) 17-18

State Farm Mutual Automobile Insurance Co. v. Duel,
324 U.S. 154 (1945) 10

Stembridge v. Georgia,
343 U.S. 541 (1952) 14, 16

Street v. New York,
394 U.S. 576 (1969) 13, 15, 16

Webb v. Webb,
451 U.S. 493 (1981) 11, 13, 15, 16

West v. Frick Co.,
183 Ga. 182, 187 S.E. 868 (1936) 13

Willingham v. Lee,
227 Ga. 425, 181 S.E.2d 49 (1971) 14

Wright v. Crawford Long Hospital of Emory University,
205 Ga. App. 653, 423 S.E.2d 12 (1992) 2

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1257 (a) ..... passim

U.S. Const. amend. V ..... passim

U.S. Const. amend. VII 16, 17, 19, 22

U.S. Const. amend. XIV ..... passim

Ga. Const. art. I, § I, ¶ I 7, 8, 14

Ga. Const. art. I, § I, ¶ II 7, 8, 14

Ga. Const. art. III, § V, ¶ III 6, 8, 14

Ga. Const. art. VI, § VI, ¶ II(1) 15

O.C.G.A. § 9-2-61 4

O.C.G.A. § 9-11-9.1 ..... passim

O.C.G.A. § 9-11-15 ..... 4, 6

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1993

FRANKLIN M. WRIGHT, Administrator of the Estate of CHRISTINE WRIGHT, Deceased,

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREENE, M.D. and CHRISTOPHER WALLS, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF RESPONDENTS WILLIAM A. DAVIS, M.D. AND DAVID GREENE, M.D. IN OPPOSITION

OPINIONS AND ORDERS BELOW

There has been a total of seven opinions and/or orders issued by the Georgia courts below, to wit: (1) Order of the Superior Court of Fulton County, Georgia, granting Respondents' motions to dismiss, dated September 13, 1991; (2) Order of the Supreme Court of Georgia transferring the appeal to the Court of Appeals of Georgia for lack of jurisdiction, dated February 12, 1992; (3) Order of the Supreme Court

of Georgia denying Petitioner's motion for reconsideration, dated March 12, 1992; (4) Opinion of the Court of Appeals of Georgia, dated September 8, 1992, reported at 205 Ga. App. 653, 423 S.E.2d 12 (1992); (5) Order of the Court of Appeals of Georgia denying Petitioner's motion for reconsideration, dated October 1, 1992; (6) Denial of petition for certiorari of the Supreme Court of Georgia, dated September 8, 1993; and (7) Order of the Supreme Court of Georgia denying Petitioner's motion for reconsideration, dated October 1, 1993. The full text of each of these opinions and orders is reproduced in Respondents' Appendix. In none of these opinions or orders did the Georgia courts address in any manner the constitutional challenges to O.C.G.A. § 9-11-9.1 that Petitioner seeks to raise before this Court.

JURISDICTIONAL STATEMENT

As discussed more fully below, this Court is without jurisdiction to grant a writ of certiorari, because no Georgia court in the proceedings below ever passed upon or addressed in any manner the constitutionality of O.C.G.A. § 9-11-9.1 under the United States Constitution. Accordingly, the jurisdictional requirements of 28 U.S.C. § 1257(a) are absent in this case, and the Petition is subject to dismissal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The texts of the constitutional provisions that Petitioner contends are involved are set forth in Petitioner's Appendix at F1-F4. Respondents take the position that none of these constitutional provisions is involved, as the constitutional attacks to O.C.G.A. § 9-11-9.1 raised in the Petition were never addressed by any Georgia court in the proceedings

below, and therefore, are not subject to this Court's review. The only statutes that are involved are 28 U.S.C. § 1257 and O.C.G.A. § 9-11-9.1 of the Georgia Civil Practice Act, which are set forth verbatim below.

28 U.S.C. § 1257. State courts; certiorari.

> a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

O.C.G.A. § 9-11-9.1. Affidavit to accompany charge of professional malpractice.

> (a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.
>
> (b) The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case

in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.

(c) If an affidavit is filed after the filing of a complaint, as allowed under subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

(d) This Code section shall not be construed to extend any applicable period of limitation.

(e) Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this Code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

STATEMENT OF THE CASE

This Petition arises out of a medical malpractice action filed on June 27, 1991 in the Superior Court of Fulton County, Atlanta, Georgia, alleging that Respondents negligently placed a guide wire used to aid in the insertion of a central line catheter in Christine Wright's body on July 4, 1989 and that such wire was improperly left in her body, resulting in complications and injury. Petitioner attached the transcript of a deposition of Pamela Benitez, M.D. to the Complaint in support of the allegations. This deposition was taken in an action which pended in the Circuit Court for the County of Wayne, Michigan, and did not involve any of the Respondents. Further, the deposition did not mention any of the Respondents by name and did not specifically set forth any negligent acts or omissions alleged to have been committed by any of the Respondents, as required by O.C.G.A. § 9-11-9.1. Moreover, Dr. Benitez specifically stated in her deposition that she had not read or even seen any of the medical records of the care rendered by any of the Respondents. Therefore, this testimony could provide no factual basis for any allegations of negligence regarding the care and treatment rendered by Respondents.

Petitioner's Complaint failed to state, in accordance with the provisions of O.C.G.A. § 9-11-9.1(b), that the action was filed within ten (10) days of the expiration of the statute of limitation and, as a result, the affidavit of an expert could not be prepared. This statement would have entitled Petitioner to an additional forty-five (45) days after the filing of the Complaint within which to supplement the Complaint with the appropriate affidavit.

On July 1, 1991, Petitioner purported to file an amendment to the Complaint setting forth this language from the

statute in an effort to trigger the protections of O.C.G.A. § 9-11-9.1(b). By a purported second amendment to the Complaint filed on August 7, 1991, Petitioner sought to incorporate the affidavit of Jose L. Evangelista, M.D. to the initial Complaint filed on June 27, 1991.

In August and September, 1991, Respondents filed separate motions to dismiss Petitioner's Complaint on the ground that Petitioner had failed to comply with the provisions of O.C.G.A. § 9-11-9.1. On September 2, 1991, Petitioner responded to these motions by claiming that the deposition transcript of Dr. Benitez was sufficient to meet the requirements of O.C.G.A. § 9-11-9.1 and alleging that the statute did not require a contemporaneous statement with the filing of the Complaint that Petitioner was unable to prepare an affidavit due to time constraints created by the statute of limitation. Instead, Petitioner argued that this language could be added by amendment under O.C.G.A. § 9-11-15.

On September 11, 1991, Petitioner filed a supplemental response to one of the Respondents' motions to dismiss and alleged, for the first time, that O.C.G.A. § 9-11-9.1 violated Article III, Section V, Paragraph III of the Constitution of the State of Georgia which prohibits a statute from referring to more than one subject matter or containing matter different from what is expressed in the title thereof. No other constitutional challenge was asserted by Petitioner in the trial court.

On September 13, 1991, the Superior Court of Fulton County, Georgia, issued an order granting Respondents' motions to dismiss. (Appendix at A1). The trial court's order did not mention or address the constitutional attack raised by Petitioner in the supplemental response.

Petitioner then proceeded to file a notice of appeal to the Supreme Court of Georgia on October 2, 1991. On February 12, 1992, the Georgia Supreme Court issued an order containing only one sentence which read: "There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals." (Appendix at B1). Petitioner then filed a motion for reconsideration with the Georgia Supreme Court regarding its order transferring the appeal. In a one-sentence order dated March 12, 1992, the Georgia Supreme Court denied Petitioner's motion for reconsideration. (Appendix at C1).

Following the Georgia Supreme Court's denial of reconsideration, the appeal was docketed in the Court of Appeals of Georgia. Even though not raised in the trial court, Petitioner attempted to expand the constitutional attacks to O.C.G.A. § 9-11-9.1 in the Court of Appeals by arguing, for the first time, that the statute also violated the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia. On September 8, 1992, the Georgia Court of Appeals rendered its opinion affirming the trial court's order dismissing the Complaint for failure to comply with O.C.G.A. § 9-11-9.1. With regard to Petitioner's constitutional challenges, the Court of Appeals held the following: "Since the trial court did not rule on appellant's [Petitioner's] contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990)." (Appendix at D1).

On September 28, 1992, Petitioner filed a motion for reconsideration with the Georgia Court of Appeals. The Court of Appeals denied Petitioner's motion in a one-sentence order issued on October 1, 1992. (Appendix at E1).

Thereafter, Petitioner filed a petition for certiorari with the Georgia Supreme Court on October 20, 1992. Included in the petition were challenges to the constitutionality of O.C.G.A. § 9-11-9.1 under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section I, Paragraphs I and II and Article III, Section V, Paragraph III of the Constitution of the State of Georgia. Declining to review the case, the Georgia Supreme Court denied the petition for certiorari in a one-sentence order dated September 8, 1993. (Appendix at F1). Petitioner then filed a motion for reconsideration with the Supreme Court on September 17, 1993, raising, for the first time, an attack to the preamble to the Georgia Constitution. On October 1, 1993, the Supreme Court issued another one-sentence order denying Petitioner's motion for reconsideration. (Appendix at G1).

Contrary to Petitioner's contentions, no Georgia court below ever expressly or implicitly addressed the constitutionality of O.C.G.A. § 9-11-9.1, either under the United States Constitution or the State of Georgia Constitution. The opinions and orders previously discussed and set forth verbatim in the Appendix hereto evidence the absence of such state judicial review.

SUMMARY OF ARGUMENT FOR DISMISSING OR DENYING THE WRIT

No Georgia court in the proceedings below ever passed upon or addressed the constitutional challenges which Petitioner seeks to raise before this Court. Therefore, this Court is without jurisdiction under 28 U.S.C. § 1257(a) to grant a writ of certiorari, and the Petition should be dismissed accordingly. Even assuming, *arguendo*, that jurisdiction in this Court is established, the Petition should be denied because no

issue deserving of this Court's consideration is presented regarding the constitutionality of O.C.G.A. § 9-11-9.1.

ARGUMENT FOR DISMISSING OR DENYING THE WRIT

I. THIS COURT IS WITHOUT JURISDICTION PURSUANT TO 28 U.S.C. § 1257(a) TO GRANT A WRIT OF CERTIORARI BECAUSE NO GEORGIA COURT IN THE PROCEEDINGS BELOW EVER PASSED UPON OR ADDRESSED THE CONSTITUTIONAL CHALLENGES RAISED IN THE PETITION FOR CERTIORARI.

This Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257(a), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In applying 28 U.S.C. § 1257(a), this Court has repeatedly held that unless a federal question has been both raised and decided in the state courts below, the jurisdiction of this

Court fails. *E.g., Illinois v. Gates*, 462 U.S. 213, 218-219 (1983), and cases cited therein; *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160-161 (1945); *Mellon v. O'Neil*, 275 U.S. 212, 214 (1927). *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988).

The rationale for this rule, sometimes called the "not pressed or passed upon below" rule, has been addressed by this Court on numerous occasions. In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940), the Court observed:

> In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

See Gates, 462 U.S. at 218-219. Further, this Court has noted that "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly

was not compiled with those questions in mind." *Gates*, 462 U.S. at 221; *Cardinale*, 394 U.S. at 439. Moreover, this Court has stated that "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground." *Cardinale*, 394 U.S. at 439. *See Gates*, 462 U.S. at 221-222; *Webb v. Webb*, 451 U.S. 493, 499-501 (1981); *Hill v. California*, 401 U.S. 797, 805-806 (1971).

In the present case, no Georgia court in the proceedings below ever expressly or implicitly passed upon the constitutionality of O.C.G.A. § 9-11-9.1, either under the United States Constitution or the Georgia Constitution. In the very first order issued in this case, the September 13, 1991 order of the Superior Court of Fulton County, Georgia, the trial court did not mention, let alone decide, any constitutional issue. (Appendix at A1). In the February 12, 1992 order of the Georgia Supreme Court, the highest court of the State of Georgia expressly held that it had no basis for jurisdiction and transferred the appeal to the Georgia Court of Appeals. (Appendix at B1). By transferring the appeal to the Court of Appeals for lack of jurisdiction, the Georgia Supreme Court in no way addressed the constitutionality of O.C.G.A. § 9-11-9.1. Likewise, the Georgia Supreme Court's March 12, 1992 order denying Petitioner's motion for reconsideration did not serve as a judicial decision on the constitutionality of the state statute. (Appendix at C1).

As demonstrated by the Georgia Court of Appeals' September 8, 1992 opinion, the court never passed upon any constitutional challenge to O.C.G.A. § 9-11-9.1. With regard to Petitioner's federal and state constitutional challenges, the Georgia Court of Appeals succinctly held: "Since the trial

court did not rule on appellant's [Petitioner's] contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990)." (Appendix at D1). Thus, the constitutionality of the state statute was neither expressly nor implicitly addressed in this opinion. Similarly, no judicial review was given by the Georgia Court of Appeals in its October 1, 1992 order denying Petitioner's motion for reconsideration. (Appendix at E1).

When the case reached the Georgia Supreme Court for the second time via a petition for certiorari, the state's highest court again did not pass upon any constitutional challenges to O.C.G.A. § 9-11-9.1. By denying certiorari pursuant to its order dated September 8, 1993, the Georgia Supreme Court declined to review any issues whatsoever. (Appendix at F1). It is well settled that a denial of a writ of certiorari carries with it no implication whatever regarding the court's views of the merits of the case. *E.g., Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950). *See Adair v. Traco Division*, 192 Ga. 59, 64, 14 S.E.2d 466 (1941). Thus, the denial of certiorari by the Georgia Supreme Court carries with it no implication whatever regarding its views of the constitutionality of O.C.G.A. § 9-11-9.1. The same holds true with respect to the Supreme Court's denial of Petitioner's motion for reconsideration on October 1, 1993. (Appendix at G1).

As with the constitutionality of O.C.G.A. § 9-11-9.1, no Georgia court below ever addressed any constitutional challenge to the preamble to the State of Georgia Constitution. This issue was not even raised until after the Georgia Supreme Court had already denied certiorari, when Petitioner filed a motion for reconsideration with the Georgia Supreme Court on September 17, 1993.

Because no Georgia court below ever passed upon or addressed in any manner the constitutional issues raised in the Petition, this Court is without jurisdiction to grant a writ of certiorari. Therefore, the Petition is subject to dismissal.

With regard to the lack of judicial review of the constitutional issues below, this Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presention in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb*, 451 U.S. at 495-496, and cases cited therein; *Street v. New York*, 394 U.S. 576, 582 (1969). In the present case, neither the Georgia Supreme Court nor Court of Appeals ruled on any federal question concerning the constitutionality of O.C.G.A. § 9-11-9.1 or the preamble to the Georgia Constitution. As shown below, this was so because no such issue was ever properly presented for review. Petitioner has failed to show otherwise.

Petitioner's purported constitutional attacks on O.C.G.A. § 9-11-9.1 were not subject to appellate review in Georgia because they were never addressed by the trial court. It is well established that the Georgia appellate courts "will never pass upon the constitutionality of an act of the General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and *distinctly passed on by the trial judge*. *Brown v. State*, 114 Ga. 60(2) (39 S.E. 873); *Georgia-Florida Ry. v. Newton*, 140 Ga. 463(3) (79 S.E. 142); *Bentley v. Anderson-McGriff Hardware Co.*, 181 Ga. 813(1) (184 S.E. 297); *West v. Frick Co.*, 183 Ga. 182 (187 S.E. 868)." *Calhoun v. State*, 211 Ga. 112, 113, 84 S.E.2d 198, 199-200 (1954) (emphasis added); *Archie v. Scott*, 190 Ga. App. 145, 146, 378 S.E.2d 182, 184 (1989); *Philyaw v. Fulton National Bank*, 139 Ga. App. 28, 29, 227 S.E.2d 811, 812 (1976). This

result is the same whether the constitutional issue was intentionally or unintentionally omitted by the trial court. *See Willingham v. Lee*, 227 Ga. 425, 181 S.E.2d 49 (1971) *(quoting Dunaway v. Gore*, 164 Ga. 219, 230, 138 S.E. 213 (1927)). Merely raising a constitutional issue, which is not distinctly passed upon in the trial court, is insufficient to constitute a basis for an enumeration of error on appeal. *Calhoun*, 211 Ga. at 113, 84 S.E.2d at 200.

Petitioner first raised a constitutional challenge to O.C.G.A. § 9-11-9.1 at the trial level in a supplemental response to one of Respondents' motions to dismiss. Petitioner's *sole* ground of attack was that O.C.G.A. § 9-11-9.1 was allegedly unconstitutional because it violated the multiple subject prohibition of the Georgia Constitution. Ga. Const. art. III, § V, ¶ III. In its order granting Respondents' motions to dismiss, the trial court did not mention, much less address, this constitutional issue. (Appendix at A1). Consequently, this constitutional challenge was not subject to review by the Georgia Supreme Court or Court of Appeals. *See Calhoun*, 211 Ga. at 113, 84 S.E.2d at 199-200, and cases cited therein; *Archie*, 190 Ga. App. at 146, 378 S.E.2d at 184; *Philyaw*, 139 Ga. App. at 29, 227 S.E.2d at 812. Further, Petitioner's federal challenges to O.C.G.A. § 9-11-9.1 based on the Fifth and Fourteenth Amendments to the United States Constitution and additional state constitutional challenges based on Article I, Section I, Paragraphs I and II of the Georgia Constitution were clearly not subject to appellate review by the Georgia Supreme Court or Court of Appeals, because these constitutional attacks were never even raised by Petitioner in the trial court. *Id. See Stembridge v. Georgia*, 343 U.S. 541, 547 (1952) (this Court recognized the principle under Georgia law that constitutional questions must first be raised in the trial court in order to be reviewed on appeal). Similarly, the challenge to the preamble to the Georgia Constitution was not subject to appellate review in Georgia,

as it was never raised in the trial court or even the Georgia Court of Appeals, and moreover, was not raised in the Georgia Supreme Court until after that court had already denied certiorari. *Id.*

Although Petitioner attempted to raise certain federal (i.e., Fifth and Fourteenth Amendments) and state constitutional challenges to O.C.G.A. § 9-11-9.1 in the Georgia Court of Appeals, that court was without jurisdiction to decide any such constitutional issues. The Constitution of the State of Georgia vests exclusive appellate jurisdiction in the Georgia Supreme Court over "[a]ll cases involving the construction of . . . the Constitution of the State of Georgia . . . and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question . . . ." Ga. Const. art. VI, § VI, ¶ II(1). This constitutional provision was applied in *Burson v. State*, 183 Ga. App. 647-648, 359 S.E.2d 731-732 (1987), where the Georgia Court of Appeals held that it had no authority to determine the constitutionality of a State statute. The *Burson* holding is particularly relevant because in that case, as in this case, the Georgia Supreme Court had transferred the appeal to the Court of Appeals, and further, the Georgia Supreme Court had not yet ruled on the constitutionality of the statute in question, as was true with respect to O.C.G.A. § 9-11-9.1.

Only the Georgia Supreme Court had jurisdiction to consider Petitioner's constitutional challenges. Ga. Const. art. VI, § VI, ¶ II(1). That court, however, declined to exercise such jurisdiction by first transferring the case to the Court of Appeals and later denying certiorari. As shown above, the failure of the Georgia Supreme Court to pass upon the constitutionality of O.C.G.A. § 9-11-9.1 and the preamble to the Georgia Constitution was due to the want of proper presentation below. *See Webb*, 451 U.S. at 495-496; *Street*, 394 U.S. at 582.

Further, with respect to the failure of the Georgia Supreme Court to pass upon these constitutional issues, this Court has held: "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge*, 343 U.S. at 547, and cases cited therein (emphasis in original). In the instant case, the Georgia Supreme Court delivered no opinion whatsoever and the judgment unquestionably rested on a nonfederal ground, as no federal constitutional issue was ever addressed by any Georgia court below. Thus, jurisdiction in this Court does not exist. *See Id.*

At each step in the Georgia appellate process, Petitioner attempted to add a new theory not previously raised in the hope that the case would be reviewed. Petitioner has taken the same approach in this Court with the challenge to O.C.G.A. § 9-11-9.1 based upon the Seventh Amendment to the United States Constitution. This issue was never raised at any level in the proceedings below, much less passed upon. Rather, Petitioner asserted this purported constitutional issue for the first time in its December 27, 1993 Petition for a Writ of Certiorari filed with this Court. Because Petitioner never raised this federal claim at any point in the State court proceedings, this issue is not subject to this Court's certiorari jurisdiction. *See, e.g., Monks v. New Jersey*, 398 U.S. 71-72 (1970) (petitioner could not raise, for first time on writ of certiorari to United States Supreme Court, constitutional issue upon which state courts had no opportunity to pass); *Stembridge*, 343 U.S. at 546[1]. *See also Bankers Life*, 486 U.S. at 76-78; *Gates*, 462 U.S. at 218-224; *Webb*, 451 U.S. at 494-502; *Street*, 394 U.S. at 581-582; *Cardinale*, 394 U.S. at 438-439; *Bailey*, 326 U.S. at 206-207.

For all the foregoing reasons, this Court is without jurisdiction under 28 U.S.C. § 1257(a) to grant a writ of certiorari. The Petition should be dismissed accordingly.

II. NOTWITHSTANDING THE LACK OF JURISDICTION, THE PETITION FOR CERTIORARI PRESENTS NO ISSUE DESERVING OF THIS COURT'S CONSIDERATION REGARDING THE CONSTITUTIONALITY OF O.C.G.A. § 9-11-9.1.

Even assuming, *arguendo*, that jurisdiction in this Court is proper under 28 U.S.C. § 1257, the Court should deny the Petition for a Writ of Certiorari, as O.C.G.A. § 9-11-9.1 is so clearly within constitutional bounds that no federal question deserving of this Court's consideration exists.

The Petition appears to raise three challenges to O.C.G.A. § 9-11-9.1 under the United States Constitution. It alleges that the statute violates: (1) Petitioner's right to due process, as guaranteed by the Fifth Amendment to the United States Constitution; (2) Petitioner's right to trial by jury, as set out in the Seventh Amendment; and (3) Petitioner's right to equal protection, as guaranteed by the Fourteenth Amendment. Notwithstanding the fact that these issues were never passed upon by a Georgia court below, these challenges do not raise any meritorious issue for this Court's consideration.

Petitioner's claim that O.C.G.A. § 9-11-9.1 violates due process is without merit. Initially, it must be noted that no suspect class or fundamental right is involved in this case, so the statute is not subject to strict scrutiny as Petitioner appears to contend. *See Dandridge v. Williams*, 397 U.S. 471 (1970). Rather, the proper test for measuring the constitutionality of O.C.G.A. § 9-11-9.1 is the "rational relationship" test: if the goals sought by legislation are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the legislation complies with the due process clause of the Fifth Amendment. *See, e.g., Richardson*

v. Belcher, 404 U.S. 78 (1971). The purpose of O.C.G.A. § 9-11-9.1 is to reduce the number of frivolous professional malpractice suits being filed. *E.g., Housing Authority of Savannah v. Greene*, 259 Ga. 435, 439, 383 S.E.2d 867, 870 (1989) (*quoting 0-1 Doctors Memorial Holding Co. v. Moore*, 190 Ga. App. 286, 288, 378 S.E.2d 708, 710 (1989)); *Bowen v. Adams*, 203 Ga. App. 123, 124, 416 S.E.2d 102, 103 (1992). This is a legitimate goal of the Georgia Legislature, as it promotes efficiency and judicial economy and minimizes the wasteful expenditure of the State courts' time, effort and economic resources. The affidavit requirement of the statute compels potential professional malpractice plaintiffs and their attorneys to conduct a minimal factual investigation prior to filing suit, helping to ensure that each case filed has, at the very least, arguable merit. In this way, the statute furthers the legitimate legislative goal, and therefore, is "rationally related" to it.

In this regard, this case is similar to *Jones v. Union Guano Co.*, 264 U.S. 171 (1923), a suit against a fertilizer company in which this Court examined a state law that required a chemical analysis of fertilizer to be performed before a suit could be filed alleging damages to crops resulting from use of the fertilizer. In holding that the statute in question complied with the due process and equal protection requirements of the United States Constitution, this Court stated, "The 14th Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object." 264 U.S. at 181. The Court in *Jones* found that in the particular lawsuits at issue, it was factually difficult to pinpoint the specific cause of a poor result. *Id.* Therefore, the chemical analysis prerequisite provided "a more definite method of ascertaining the essential facts, and a better basis upon which judicial determinations . . . [could] be made." *Id.*

The same applies to the affidavit requirement of O.C.G.A. § 9-11-9.1. In professional malpractice actions, expert testimony is necessary to establish the parameters of the standard of care and to show a deviation from that standard. The affidavit requirement of O.C.G.A. § 9-11-9.1 is reasonably related to achieving the State's legitimate goal of reducing the number of frivolous lawsuits. The Georgia statute therefore poses no due process violation.

Petitioner's allegations that O.C.G.A. § 9-11-9.1 violates the right to a trial by jury under the Seventh Amendment to the United States Constitution are without merit. This Amendment applies to suits in federal court and is not extended to suits in state courts. *Eilenbecker v. Plymouth Co.*, 134 U.S. 31 (1890); *O'Connor v. Nevada*, 507 F.Supp. 546 (D. Nev. 1981), *aff'd*, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071; *Iacaponi v. New Amsterdam Cas. Co.*, 258 F.Supp. 880 (D. Pa. 1966), *aff'd*, 379 F.2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054. Thus, Petitioner's references to the Seventh Amendment to the United States Constitution are misplaced.

Furthermore, O.C.G.A. § 9-11-9.1 complies with the equal protection provisions of the Fourteenth Amendment to the United States Constitution. In *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), this Court enunciated the standard of review for equal protection analysis as follows:

> [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [cits. omitted] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute

> into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." [cit. omitted]

As previously discussed, O.C.G.A. § 9-11-9.1 passes this "rational relationship" test. Its purpose is to reduce the number of frivolous professional malpractice suits being filed. *E.g., Greene*, 259 Ga. at 439, 383 S.E.2d at 870; *Bowen*, 203 Ga. App. at 124, 416 S.E.2d at 103. The requirement that a professional malpractice plaintiff file an expert affidavit with the complaint setting forth at least one negligent act or omission is reasonable and bears a fair and substantial relationship to the object of this statute. It accomplishes this objective by requiring the plaintiff to show at the outset of the litigation that a frivolous suit is not being filed.

The Georgia Supreme Court has repeatedly upheld a separate classification of medical malpractice actions as a rational exercise of legislative power presenting no equal protection or due process violation. *Hamby v. Neurological Associates, P.C.*, 243 Ga. 698, 256 S.E.2d 378 (1979) (separate classification of two-year statute of limitation for medical malpractice loss of consortium claims, as opposed to four-year statute of limitation applying to all other loss of consortium claims upheld); *Perry v. Atlanta Hospital & Medical Center, Inc.*, 255 Ga. 431, 339 S.E.2d 264 (1986) (same classification as in *Hamby, supra*, upheld); *Allrid v. Emory University*, 249 Ga. 35, 38-39, 285 S.E.2d 521, 524-525 (1982) (separate classification between medical malpractice statute of limitation for foreign object cases and all other medical malpractice cases upheld). Likewise, the separate classification of medical malpractice actions under

O.C.G.A. § 9-11-9.1 presents no equal protection or due process violation.

Petitioner's predicament in this case did not arise from a denial of due process, but rather, from a failure to properly exercise rights under Georgia law. Instead of filing the required affidavit contemporaneously with the Complaint, Petitioner filed a deposition taken in another case, which did not mention any of the Respondents by name, set out the parameters of the standard of care, or allege any particulars of how any of the Respondents deviated therefrom. Moreover, the deponent admitted that she had not reviewed any medical records pertaining to the care provided by the Respondents. As this Court recognized in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication . . . . And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." Petitioner would have had an opportunity to present the merits of the case to a jury had Petitioner properly followed the reasonable procedure established by the Georgia Legislature. O.C.G.A. § 9-11-9.1 does not violate any of the Constitutional provisions that Petitioner attempts to invoke.

Petitioner mentions several theories upon which Petitioner fails to expand. The first "question presented" in the Petition appears to raise some sort of federalism issue regarding the preamble to the Georgia Constitution. Petitioner, however, fails to show how this preamble had any impact on this case. Petitioner also claims that this case involves diversity of citizenship. This is a non-issue. It is difficult to ascertain the purpose for invoking this artifact, as the Petitioner, being the plaintiff below, voluntarily invoked the jurisdiction of the Georgia State court by filing the Complaint

therein, instead of in federal court where diversity may have some application. In addition, Petitioner's assertion that the Georgia Constitution gives greater weight to Georgia citizens than those of other states is without legal or factual support. There is no showing of any preferential or differential treatment provided to Georgia citizens but denied to Petitioner.

Because O.C.G.A. § 9-11-9.1 does not violate the United States Constitution in any respect, there is no federal issue to trigger this Court's review on certiorari.

CONCLUSION

There has been no judicial review of the constitutionality of O.C.G.A. § 9-11-9.1 by any Georgia court below, much less the highest state court as required by 28 U.S.C. § 1257(a). The Georgia Supreme Court declined to review the entire case on appeal, including any of Petitioner's constitutional challenges. The Georgia Court of Appeals was without jurisdiction to review any such constitutional issues. Petitioner's constitutional challenges were not subject to appellate review by either the Georgia Supreme Court or Court of Appeals as they were never passed upon or addressed in any manner by the trial court. More specifically, Petitioner's federal constitutional attacks based on the Fifth, Seventh and Fourteenth Amendments to the United States Constitution were not subject to review by either Georgia appellate court because they were not even raised by Petitioner in the trial court. Consequently, this Court is without jurisdiction to grant a writ of certiorari, and the Petition should be dismissed accordingly. Notwithstanding the lack of jurisdiction, O.C.G.A. § 9-11-9.1 clearly complies with the United States Constitution, so no federal question deserving of this Court's consideration is presented. Therefore, certiorari should be denied in any event.

DATED: January 27, 1994
Atlanta, Georgia

Respectfully submitted,

Bradley C. Reeves
Counsel of Record

Gary R. McCain
ALLEN & PETERS
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 874-1700

Attorneys for Respondents William A. Davis, M.D. and David Greene, M.D.

APPENDIX

INDEX TO APPENDIX

Order of the Superior Court of Fulton County, Georgia, dated September 13, 1991 ..... A1

Order of the Supreme Court of Georgia, dated February 12, 1992 ..... B1

Order of the Supreme Court of Georgia, dated March 12, 1992 ..... C1

Opinion of the Court of Appeals of Georgia, dated September 8, 1992 ..... D1

Order of the Court of Appeals of Georgia, dated October 1, 1992 ..... E1

Denial of Petition for Certiorari of the Supreme Court of Georgia, dated September 8, 1993 ..... F1

Order of the Supreme Court of Georgia, dated October 1, 1993 ..... G1

APPENDIX A1

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

CHRISTINE WRIGHT,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	FILE NO. D-90848
vs.	:	
	:	
CRAWFORD LONG HOSPITAL	:	
OF EMORY UNIVERSITY,	:	
JOHN K. SCHELLACK, M.D.,	:	
CHRISTOPHER DOOLEY, M.D.,	:	
M. EDWYN HARRISON, III, M.D.,	:	
WILLIAM A. DAVIS, M.D.,	:	
DAVID GREEN, M.D. and	:	
CHRISTOPHER WALLS, M.D.,	:	
	:	
Defendants.	:	

ORDER

Upon full consideration of the record, Defendants' Motion to Dismiss is hereby GRANTED.

Plaintiff filed this medical malpractice action against Crawford Long Hospital as well as six doctors alleging that the Defendants failed to remove an introducer wire used during the insertion of a central line catheter in Plaintiff's body on July 4, 1989. The Plaintiff

filed with her Complaint a deposition of Pamela Benitez, M.D., however, the Complaint did not include the expert affidavit required by O.C.G.A. § 9-11-9.1(a). Neither did the Plaintiff's Complaint allege that due to time constraints an expert affidavit could not be prepared and that Plaintiff would need the extra 45 days permitted by O.C.G.A. § 9-11-9.1(b).

On July 1, 1991, in an attempt to comply with the O.C.G.A. § 9-11-9.1 requirement, the Plaintiff filed an amended Complaint stating that due to time constraints an expert affidavit could not be prepared and filed contemporaneously with the Complaint. On August 7, 1991, a second amended Complaint was filed with the required expert affidavit attached.

We have no choice but to dismiss this Complaint for failure to fulfill the contemporaneous filing requirements. Under O.C.G.A. § 9-11-9.1(e) Plaintiff's first and second amendments to the original Complaint cannot cure this defect.

Plaintiff responds to this Motion to dismiss by contending that first, the statute does not by its terms require a contemporaneous allegation of unavailability and second, the deposition attached to the original Complaint was sufficient to satisfy the requirements of O.C.G.A. § 9-11-9.1. With both these contentions we disagree.

Section b of O.C.G.A. 9-11-9.1 states, "The contemporaneous filing requirement of subsection (a) of

this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared." The language of the statute reads very clearly. The requirement that the Plaintiff allege that time constraints have prevented the contemporaneous filing of an affidavit with the Complaint is mandatory, not permissive.

The Plaintiff's contention that the deposition attached to the original Complaint was sufficient to satisfy the affidavit requirements of O.C.G.A. § 9-11-9.1 must also fail. O.C.G.A. § 9-11-9.1(a) states, "In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."

The deposition attached to Plaintiff's original Complaint does not set forth the factual basis for the claim of malpractice. In fact, the deposition never mentions the particular Defendants involved in this case, let alone the acts of negligence they are alleged to have performed. The deposition of Dr. Benitez merely states that an introducer wire was left in the Plaintiff's body and that failure to remove this wire in a patient upon withdrawal of a CVP line violates the standard of care generally accepted in the community. Dr. Benitez never states that she has reviewed the work performed by the

particular Defendants in this matter and that their acts or failure to act fell below the standard of care generally accepted in the community. Allowing this particular deposition to fulfill the requirements of O.C.G.A. § 9-11-9.1 would undermine the public policy of the statute which is "to require the plaintiff to 'set forth the particulars of the claim'" in order to prevent frivolous or unsustainable malpractice actions. (cits.) *Cheeley v. Henderson*, 197 Ga. App. 543 (1990) reversed on other grounds, _____ Ga._____ (1991).

We therefore GRANT the Defendant's Motion for Summary Judgment and DISMISS the Plaintiff's Complaint for failure to comply with O.C.G.A. § 9-11-9.1.

This 13th day of SEPTEMBER, 1991.

/s/ Joel J. Fryer
JUDGE, FULTON SUPERIOR COURT, A.J.C.

cc: John A. Gilleland, Esq.
Kimberly Logue Woodland, Esq.
LOVE AND WILLINGHAM
Suite 500
The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

William A. Dinges, Esq.
SILER & JONAP
P.O. Box 49006
Atlanta, Georgia 30359

Hunter S. Allen, Esq.
ALLEN & PETERS
Two Midtown Plaza
Suite 1700
1360 Peachtree Street, N.E.
Atlanta, Georgia 30309

J.M. Hudgins
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

APPENDIX B1

Case No. S92A0520

SUPREME COURT OF GEORGIA

ATLANTA February 12, 1992

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

From the SUPERIOR COURT of FULTON County.

There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals. Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham, Fletcher, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Lynn M. Stinchcomb, Deputy Clerk.

APPENDIX C1

SUPREME COURT OF GEORGIA

ATLANTA MARCH 12, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S92A0520

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Joline B. Williams, Clerk.

APPENDIX D1

FIRST DIVISION
SOGNIER, C.J.
McMURRAY, P.J., COOPER, J.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985)

SEPT 8, 1992

In the Court of Appeals of Georgia
A92A0964. WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY et al. S-63

SOGNIER, Chief Judge.

Christine Wright bought [sic] a medical malpractice claim against Crawford Long Hospital and six physicians. Her complaint, as amended, was dismissed for noncompliance with OCGA § 9-11-9.1, and she appeals.

In her complaint appellant alleged that defendants were liable for damages she incurred when an introducer wire was left in her body during catheterization procedures performed in July 1989. Appellant attached to her complaint the deposition of Dr. Pamela Benitez, the surgeon who discovered and removed the wire in December 1989. In this deposition, which was

given in a Michigan lawsuit, Dr. Benitez testified that leaving a broken catheter threader wire in a patient's body violated the applicable standard of care. However, Dr. Benitez also stated that the wire she removed was not the kind of wire used to thread a catheterization line and that she did not recognize the type of wire and was unable to identify a medical procedure in which such a wire would be used. In addition, Dr. Benitez testified that she had not reviewed appellant's medical records pertaining to the procedures performed by appellees and did not know the names of appellant's Georgia physicians.

Four days after filing her complaint, appellant amended it to allege that the statute of limitation would expire within ten days of filing and that because of this time constraint she was unable to obtain the required affidavit before filing the complaint. Appellees raised the issue of noncompliance with OCGA § 9-11-9.1 in their answers and motions to dismiss. In her second amendment to the complaint, filed 41 days after the complaint was filed, appellant attached the affidavit of Dr. Jose Evangelista, who averred that he had reviewed the records of appellees' treatment of appellant and had determined that appellees were negligent in failing to remove a catheter guide wire and in failing to so inform appellant. The trial court dismissed the complaint on the basis that Dr. Benitez's deposition testimony did not satisfy the requirements of OCGA § 9-11-9.1(a) and that appellant could not amend the action to add Dr. Evangelista's affidavit because the original complaint did not include the language required by OCGA § 9-11-9.1(b).

1. Contrary to appellant's contentions, the deposition did not meet the requirement of "set[ting] forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim," OCGA § 9-11-9.1 (a), as Dr. Benitez did not identify any negligent act committed by appellees and was unable even to speculate as to the source of the wire. See *Piedmont Hospital, Inc. v. Milton*, 189 Ga. App. 563, 564 (377 SE2d 198) (1988). Thus, the complaint as originally filed was subject to dismissal for noncompliance with OCGA § 9-11-9.1.

2. Alternatively, appellant contends she properly amended her complaint under either OCGA § 9-11-9.1 (b) or (c). The statute permits amendment of a complaint to add the required affidavit only in limited circumstances: (1) if the statute of limitation will expire within ten days and the plaintiff alleges that an expert affidavit could not be prepared because of time constraints (OCGA § 9-11-9.1 (b)); or (2) if the court determines that the plaintiff had the requisite affidavit available before the complaint was filed and the failure to file "was the result of a mistake" (id. at (e)). Paragraph (e) does not apply because Dr. Evangelista's affidavit was dated after suit was filed, and appellant does not contend the affidavit was available prior to filing. See *Cheeley v. Henderson*, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991); compare *Hospital Authority of Fulton County v. McDaniel*, 192 Ga. App. 398 (385 SE2d 8) (1989). Paragraph (b) likewise is inapplicable because appellant did not allege in her original complaint that

she was unable to obtain an affidavit because of time constraints, but instead alleged that the requisite affidavit — the deposition of Dr. Benitez — *was* attached to and filed with the complaint, but the deposition was insufficient.

Appellant maintains that under the liberal amendment provisions of OCGA § 9-11-15, she was entitled to amend her complaint to add the allegations required by OCGA § 9-11-9.1 (b) and then to file a second amendment to add the affidavit as contemplated by paragraph (b). We disagree, for in *Cheeley*, supra, the Supreme Court held that the contemporaneous filing requirement is mandatory and that the filing of an insufficient affidavit cannot be cured by amendment unless the requirements of paragraph (e) are met. As the court noted, paragraph (e) expressly states that the failure to comply with the contemporaneous filing requirement cannot be cured by amendment under OCGA § 9-11-15 unless the affidavit was available prior to the filing of the complaint but was not filed due to a mistake. *Cheeley*, supra at 499. The legislature clearly has limited the manner in which OCGA § 9-11-15 is applied in malpractice cases and has authorized amendment only in certain limited circumstances not present here.

Although this court reached a contrary result in *Thompson v. Long*, 201 Ga. App. 480 (411 SE2d 322) (1991), that case involved a pro se plaintiff and applied the less stringent pleading standard used in pro se cases but not applicable here. Moreover, the *Thompson* plaintiff clearly had intended from the outset to proceed

under paragraph (b) — i.e., to file the complaint just before the statute of limitation expired and then to obtain and file the affidavit thereafter — but neglected to add the "magic language" in her pleading, id. at 482, whereas here appellant originally filed a deposition she alleged met the requirements of paragraph (a). Thus, this case, like *Cheeley*, "involves the misinterpretation of OCGA § 9-11-9.1 (a).... Because of the misinterpretation, the requisite affidavit [filed with the complaint] failed to comply with OCGA § 9-11-9.1 (a)." (Punctuation and citation omitted.) *Cheeley*, supra at 498 (3). Accordingly, the trial court properly granted appellees' motions to dismiss.

3. Since the trial court did not rule on appellant's contentions that OCGA § 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. *In re Parrott*, 194 Ga. App. 856 (392 SE2d 48) (1990).

Judgment affirmed. McMurray, P.J., and Cooper, J., concur.

APPENDIX E1

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, OCTOBER 01, 1992

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A92A0964

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF
THE STATE OF GEORGIA
Clerk's Office, Atlanta OCT 1 1992

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin, Clerk.

APPENDIX F1

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA
DATE: SEPTEMBER 08, 1993

Hunter S. Allen, Jr.
ALLEN & PETERS
Two Midtown Plaza, Suite 1700
1360 Peachtree Street, N.E.
Atlanta Ga 30309

Case No. S93C0114
CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

COURT OF APPEALS CASE NO. A92A0964

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., and Carley, J., who dissent.

_____

_____

_____

Sincerely,

Sherie M. Welch, Clerk

APPENDIX G1

SUPREME COURT OF GEORGIA

ATLANTA OCTOBER 01, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93C0114

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Sherie M. Welch, Clerk.